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CHRONICLES AND MEMORIALS OF GREAT BRITAIN AND IRELAND

DURING

THE MIDDLE AGES.

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THE CHRONICLES AND MEMORIALS

OF

GREAT BRITAIN AND IRELAND

DURING THE MIDDLE AGES.

PUBLISHED BY THE AUTHORITY OF HER MAJESTY'S TREASURY, UNDER THE DIRECTION OF THE MASTER OF THE ROLLS.

On the 26th of January 1857, the Master of the Rolls submitted to the Treasury a proposal for the publication of materials for the History of this Country from the Invasion of the Romans to the reign of Henry VIII.

The Master of the Rolls suggested that these materials should be selected for publication under competent editors without reference to periodical or chronological arrangement, without mutilation or abridgment, preference being given, in the first instance, to such materials as were most scarce and valuable.

He proposed that each chronicle or historical document to be edited should be treated in the same way as if the editor were engaged on an Editio Princeps; and for this purpose the most correct text should be formed from an accurate collation of the best MSS.

To render the work more generally useful, the Master of the Rolls suggested that the editor should give an account of the MSS. employed by him, of their age and their peculiarities; that he should add to the work a brief account of the life and times of the author, and any remarks necessary to explain the chronology; but no other note or comment was to be allowed, except what might be necessary to establish the correctness of the text.

The works to be published in octavo, separately, as they were finished; the whole responsibility of the task resting upon the editors, who were to be chosen by the Master of the Rolls with the sanction of the Treasury.

The Lords of Her Majesty's Treasury, after a careful consideration of the subject, expressed their opinion in a Treasury Minute, dated February 9, 1857, that the plan recommended by the Master of the Rolls "was well calculated for the accomplishment of this important national object, in an effectual and satisfactory manner, within a reasonable time, and provided proper attention be paid to economy, in making the detailed arrangements, without unnecessary expense."

They expressed their approbation of the proposal that each Chronicle and historical document should be edited in such a manner as to represent with all possible correctness the text of each writer, derived from a collation of the best MSS., and that no notes should be added, except such as were illustrative of the various readings. They suggested, however, that the preface to each work should contain, in addition to the particulars proposed by the Master of the Rolls, a biographical account of the author, so far as authentic materials existed for that purpose, and an estimate of his historical credibility and value.

Rolls House,
December 1857.

HENRICI DE BRACTON

DE

LEGIBUS ET CONSUETUDINIBUS

ANGLIÆ.

Bracton, Henry de

HENRICI DE BRACTON

DE

LEGIBUS ET CONSUETUDINIBUS ANGLIÆ.

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EDITED

BY

SIR TRAVERS TWISS, Q.C., D.C.L.

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INTRODUCTION.

INTRODUCTION.

THERE is some obscurity as regards the personality of the author of the following work on the Laws and Customs of England. The title prefixed to the earliest printed book (A.D. 1569) is "Henrici de Bracton de "Legibus et Consuetudinibus Angliæ, Libri Quinque," and the text of the same printed book (cap. I. §. 3), in which the author is described as "Ego Henricus de Bracton," affords evidence of a tradition as to the names of the author, which was current at the time when the MSS. which the editor of the printed book had before him, were compiled. It appears, however, on further research, that the names of the author are not so set forth in the most ancient extant MSS., in which the reading of the passage above alluded to is anonymous, namely, "Ego "talis" instead of "Ego Henricus de Bracton." There is, however, no reasonable doubt, that the names of the author were "Henricus de Bractone," or if the guttural be suppressed, according to a well-known linguistic law, "Henricus de Brattone." The divers spelling of the names within this limit is so far immaterial. Thus "Ego Henricus de Bractone" is the spelling of the Corbet MS. in the Bodleian Library, Oxford, whilst the Goldbold MS. in the Library of Gray's Inn, London, has "Henricus de Brattone," yet it is highly probable, from internal evidence, that both these MSS. were copied from a common original. Similar and corresponding variations are found in the spelling of the same names in legal documents of the reign of Henry III. Thus a certain

Justiciary of the Crown is described in the Placitorum Abbreviatio, folio 138 (36 H. III.), as Henricus de Bratton, "et lectum est breve Domino H. de Bratton "directum, per quod Dominus Rex ipsum Justiciarium, "etc.," whilst in the Nova Fœdera, vol. 1. p. 320, there is the record of an assise held in 39 H. III. (A.D. 1255):— "Coram Justiciariis H. de Bathonia, Henrico de Bracton, "etc.," and in the Excerpta Rotulorum Finium there are numerous records of payments made for assises held before Henricus de Bractone or Henricus de Brattone, as the case may be, from the years 1250 to 1267 inclusive. That the justiciary mentioned in the above passages is identical with the author of the present work is most probable, and on that supposition the earliest mention of the author will be found in a final concord made in the year 1246 (30 H. III.) "Coram H. de Bathonia, Jeremia de "Caxton, et Henrico de Bracton, Justiciariis et aliis Domini "Regis fidelibus." Such is the light, which contemporary history supplies as to the names of the author. It should be observed, however, that the surname of the author has been spelt in other ways by various writers. For instance, Selden, in his commentary on Fleta, mentions not less than six variations, *e.g.*, Braton, Bratton, Braketon, Brecton, Britton, and Bryckton. The name of Bracton was not uncommon in the reign of Henry III., as in the Placitorum Abbreviatio, in addition to Henricus de Bracton, there are mentioned Thomas, Robert, and Humphrey de Bracton. That the author held the correct spelling of his surname to be "Bracton" may be inferred from a remarkable passage which occurs in folio 188. b. of the printed book, of 1569, in which the author discusses the fatal character of certain clerical errors in a writ of novel disseysine:—"Item si erratum sit in syl- "laba, ut si quis alium nominet Henricum de Brocke- "ton, ubi nominari deberet Henricus de Bracton. Item "idem erit in litera, ut si quis erraverit sic nominando "Henricum de Bracthon, ubi nominare deberet Hen-

" ricum de Bracton, et omnia ista probari possunt per " exempla. Item adhuc idem erit, si de nomine con- " stiterit et cognomine, erratum tamen sit in nomine " dignitatis, ut si dicatur in brevi, Questus est nobis " Henricus de Bractona præcentor, cum sit decanus, et " sic cadit breve."

That the author of the work was an ecclesiastic is almost a necessary inference from various passages of the text. He speaks in several places of laymen, as persons for whom allowances are to be made in matters of law, on account of their being so little versed in them ("propter " simplicitatem laicorum," fol. 53 & 95). His familiarity with the law ecclesiastical of England in matters of burial, of testaments, and of advowsons, can hardly be accounted for on any other supposition, than that he was *clericus*. His quotations from Beatus Augustinus and from the Old Testament in denuntiation of judicial incompetence and judicial corruption, and his references to the Lord the Pope, and to the Blessed Virgin Mary, the Mother of God, &c., are highly appropriate in the mouth of an ecclesiastic, whilst his intimate acquaintance with the Decretum and the Decretals, as well as with the Roman Civil Law points in the same direction. Some stress also may be laid on a passage in l. i. ch. iv. sec. 3., in which he speaks of himself and others engaged in the administration of the law, as justly called "priests," quia jus " dicitur ars boni et æqui, cujus merito quis nos *sacer-* " *dotes* appellat, justitiam namque colimus et sacra jura " ministramus." Such language would be hardly becoming in the mouth of a layman. Besides, there are on record Letters Patent of 1254 (38 H. III.) in which there is made to Henricus de Bracton for his chambers a grant of the London mansion of the deceased Earl of Derby during the minority of the heir, and in that grant he is styled by the King " dilectus clericus noster," Dugdale's Origines, 56. If the identity of the grantee under these Letters Patent with the author of the present work can

not well be disputed, they are conclusive of all question as to his clerical character.

Nothing, however, is known for certain as to the time of his birth or the time of his death, but the text of the work itself supplies ample materials for reasonable conjecture as to the time, within which its different parts were composed. The Editor ventures at once to express his opinion, that the work was not originally composed in the form in which it has come down to us, but that it consists of various treatises (tractatus) composed at intervals by the author, and not written *uno tenore*, although ultimately consolidated by the author himself into an aggregate treatise. The work itself, it may be observed, is incomplete, the author having promised in several places to treat of subjects further on (inferius), which he has not discussed, or, if they ever were discussed by him, the MSS. treatises have not been preserved with the rest of the work. This hypothesis of the work being an aggregate collection of separate treatises would further explain the variations, which are found to exist in certain MSS. in the grouping of the treatises under different heads, and in the different divisions of the books.

With regard to the time of the death of the author, if the conjecture be well founded, that the author is to be identified with the justiciary, who bore the same names, and before whom assises are recorded to have been held very frequently in the reign of Henry III., there is trustworthy evidence of his death not having taken place until some time after A.D. 1267 (52 H. III.). There is also some further evidence to be found in a MS. which does not appear to have been known to the editor of the printed book of 1569, that the author may have been alive, when the first Statute of Westminster (3 Edw. III.) was enacted. The MS. in question is preserved in the Bodleian Library, Oxford, amongst the Rawlinson MSS. and is catalogued Rawlinson C. 160. It is an early

fourteenth century MS. to judge from the writing, which is in a court hand, and it contains so accurate a text, that the Editor of the present volume has been enabled, by a collation of it with the text of the printed book, to correct many errors of the latter, which, no doubt, arose from the obscurities of the MSS. to which the editor of the printed book had access. That the Rawlinson MS. has been copied from a MS. of an earlier period than any which is known to exist at present, cannot well be doubted from a circumstance, to which the Editor will have to refer further on in the course of this introduction. But this MS. contains in the opening part of the treatise, which is the second treatise of the third book, and is entitled "De Corona" in the printed book of 1569, certain capitula or heads of inquiry to be administered by the King's Justiciaries on their circuits, which are not found in any other MS. of Bracton, with which the Editor is familiar. They are inserted immediately after the "Nova Capitula" contained in Chapter I. of the printed book, and form, in fact, two additional paragraphs to that chapter, preceding immediately Chapter II. which contains the writ of general summons to the Barons of Hastings to attend the judges itinerant at Shepwey in Kent. The first of these additional sets of articles of enquiry is entitled, "Item nova capitula de tempore regis "Edwardi, filii regis Henrici tertii," and the second, "Item capitula tangentia prima statuta Westm̃, in anno "regni regis Edwardi, filii regis Henrici tertii." Two similar sets of articles of enquiry for the use of the judges itinerant on their circuits, with slight variations of the text, have been printed by the Record Commissioners in their edition of the Statutes of the Realm as "capitula in-"certi temporis." The version of them so printed has been copied from a text contained in the Liber Custumarum of the City of London, which latter work has been subsequently published amongst the Rolls Series in 1860. The version, however, so published in that series was the

current version in the reign of Edward II. and was administered to the citizens of the various wards of London during the iter of the king's Justiciaries in 14 Edw. II. The Record Commissioners do not appear to have been aware, that the original text of these articles, as drawn up in the early years of the reign of Edw. I., has been preserved in a MS. of Bracton. Their presence, however, in that MS. is by no means conclusive, that they were drawn up by Bracton himself, although they were, no doubt, drafted by one of the king's justiciaries, if not by the *capitalis justiciarius de banco* himself, for the earlier articles of enquiry, drawn up at the commencement of the reign of Henry III. at the conclusion of the Civil War, appear to have been framed by Martinus de Pateshull, who was at that time Chief Justice of the Common Pleas.

If it were permissible to speculate; as to which portion of the work was first composed by the author, the Editor would have no difficulty in selecting the second treatise of the third book, which is entitled "De Corona" in the printed book of 1569, but to which is prefixed in the MS. already alluded to, the title "De Itinere Justiciariorum." This treatise has near its commencement a passage, which has perplexed many commentators, in which the author, having stated the order of proceeding in holding the circuit of the judges, goes on to state the tenor of the judge's address, by which the assize is usually opened, in these words, "Et proponi solent verba ista per Martinum de Pateshull." Now according to Matthew Paris Martinus de Pateshull died in 1229, but our author in fol. 50 of the printed edition, quotes from the Rolls of a Lancaster assise a judgment of Martinus de Pateshull of 16 H. III., and he quotes this iter as the last iter of that judge in the county of Lancaster. This date would give to Martinus de Pateshull a prolongation of his tenure of office to 1232. The commentators, who have treated the work of our author, as if it had been com-

posed *uno tenore*, have felt themselves constrained to give a non-natural interpretation to the words "et proponi solent," and they have suggested that these words have been loosely written and mean nothing more, than that the judges were in the habit in Bracton's time of using a form of words first introduced by Martinus de Pateshull. It will be found, however, on examination of the text of the treatise "de Corona," or rather of the treatise "de Itinere Justiciariorum" in MS. Rawlinson C. 160, that there is no reference in that treatise to any judgment later than the last iter of Martinus de Pateshull in 16 H. III. The treatise, however, as printed in the edition of 1569, does furnish one exception to this remark, namely, the case of Peter of Savoy, in the Court of Exchequer, which is stated in these words: "Casus de Petro "de Sabaudia et tenentibus suis coram consilio domini "regis apul Westm̃ ad scaccarium anno regni regis H. xlvi de termino Paschæ paulo ante ascensionem" (fol. 159 printed edition of 1569). But this case is not alluded to in MS. Rawlinson, C. 160, nor in several others of the earlier MSS., and it has rather the appearance of a side-note, which has been transferred into the text of a certain class of MSS. by an error of the scribe. The case itself of Peter of Savoy, as it stands, is quite unconnected with the rest of the text. A striking instance of a similar interpolation occurs in folio 26 of the printed book. Mention is there made of a judgment of John de Metingham, as a Justice of the Bench, at Westminster without any date. John de Metingham, however, was not a Justice of the Bench until 4 Edward I., and in MS. Rawlinson, C. 160 and certain others of the earliest MSS. there is no mention in this place of any judgment of John de Metingham.

Under any circumstances the treatise which is entitled in MS. Rawlinson, C. 160, "De Itinere Justitiariorum" contains nothing, which forbids us to interpret the words "proponi solent" in their literal sense, as implying that

Martinus de Pateshull was still living, when that treatise was first composed. It is not of adequate importance to analyse the cases cited in the other treatises with the same accuracy, in order to determine the probable period of the composition of each, except as regards the first treatise, which is entitled "the First Book" and in which occurs the passage already cited, where the author speaks of himself and others engaged in the administration of the law, as deservedly called priests. This passage, it should be remarked, is suggestive that the author was, at the time, when it was written, one of the King's Justiciaries. The earliest record on the other hand, which has been preserved to us of Henricus de Bracton being one of the King's Justiciaries is contained, as already mentioned, in a final concord made in 30 H. III. (1246), before himself and two others, who were equally Justiciaries of the Crown. The Editor is further disposed to think from the tone of authority, in which the writer of the work condemns certain judgments of other justiciaries itinerant, as bad expositions of the law, that he was a justiciary of some standing at the time, when he expressed his disapproval of those judgments, and that his personal experience and position entitled him to make known his dissent from them in language of this kind, "quod ego non approbo," f. 22; "contrarium factum "fuit et male de errore curiæ et quasi de consilio curiæ," fol. 29; "male actum est in contrarium," f. 49 b. These expressions occur in the second book, and there is internal evidence in that book, that it was written about A.D. 1256–57. This evidence is contained in a passage which treats the election, or it may be the confirmation of the election, of Richard, Earl of Cornwall, the brother of King Henry III., to be king of the Germans, as a contingency still subject to the snares of fortune. Bracton, fol. 47 of this book gives the following example of conditional donations:—"Ut si dicatur, do "tibi tali tantum terræ, si navis venerit ex Asia, vel

" comes Ricardus effectus fuerit Rex Alemannorum." The reading of this passage in the printed book agrees accurately with the reading of MS. Rawlinson, C. 160. It appears from the historical records of the Roman Empire of the Germans, that William, Count of Holland, the immediate predecessor of Richard, Earl of Cornwall, died in January 1256, and that Richard was elected King of the Romans in January 1257, but was not crowned Roman Emperor of the Germans until May 1257. It is hardly credible, that Bracton should have accidentally thought of the possibility of this election before the death of William of Holland had made a vacancy in the imperial throne, and it is reasonable to suppose that when he instanced such a condition, accompanied by the words "cum dependeat ex insidiis fortunæ," its fulfilment was still uncertain. Further, immediately upon the death of William of Holland many candidates announced themselves, but the first overtures to Earl Richard were only made in the spring of 1256, and the negotiations with the electors of the empire, which ended in his election, were not completed before January 1257. Earl Richard's coronation also was forcibly opposed in the interval between January 1257 and May 1257, so that it may have been for some time doubtful, whether his election would ever be effective, and this may have been the ultimate condition contemplated in the passage. Under either interpretation, which may be given to the word "effectus," whether it was meant by the author to refer to the election of Earl Richard, or to his coronation, it limits the time, at which the passage was written, to the interval between January 1856 and May 1857. Professor Karl Güterbock, one of the superior judges of the Stadgericht of Königsberg in Prussia, and Professor of Law in the University of Königsberg, who has recently writted a most able work on the relation of Bracton to the Roman Law,[1] considers this passage to be

[1] "Henricus de Bracton und sein Verhältniss zum Römischen Rechte. Berlin, 1862."

decisive, that at least this part of Bracton's work was written pending the negotiations, which preceded Earl Richard's election, that is, in the course of the year 1256.

It has been already observed, that various interpolations have been made in the text of the various treatises, since they were first drawn up by Bracton. In many cases these additions run on smoothly, and do not of themselves arrest the attention of the reader, whilst they have been in some instances inserted inopportunely, and make the text obsure. A striking instance of such a case occurs in the third treatise of the fourth book, which is entitled, "De assisa mortis antecessoris." The author is treating of the writ of mortdancestor, and recites it in these words according to the text of the printed edition of 1569 :—

"Rex Vicecomiti salutem, Si talis fecerit te secur-
" um de clameo suo prosequendo &c. tunc summone
" per bonos summonitores XII liberos et legales ho-
" mines, de visneto de tali villa, quod sint coram
" justiciariis nostris ad primam assisam, cum in
" partes illas venerint, parati sacramento recognoscere,
" si talis pater vel mater, vel avunculus, vel amita,
" frater vel soror ipsius talis fuit seysitus vel seysita
" in dominico suo, ut de feodo, de tanto terræ et
" tanto redditu cum pertinentiis in tali villa, *de quo*
" *obiit, et si obiit post ultimum reditum Regis Jo-*
" *hannis patris nostri de Hibernia in Angliam, (et*
" *tempore regis Edwardi mutatus fuit terminus iste*
" *post coronationem regis Henrici patris ipsius Ed-*
" *wardi*) et si prædictus talis ejus hæres propinquior
" sit," etc., fol. 253 b.

The parenthesis in this writ, which refers to the alteration of the time of prescription in writs of mortdancestor as enacted by 3 Edw. III. ch. 35, has been a stumbling block to critics, who have otherwise felt satisfied, that Bracton's work was completed by himself in the course of the reign of Henry III. But there can

be little doubt, that in the original text of Bracton's work there was no such allusion to the alteration enacted by 3. Edw. III. or by what is usually called the Statute of Westminster the First, as having been enacted in the first year after the return of King Edward III. to England. The Editor has submitted to a very careful examination the text of this passage, as it occurs in the best MSS., eleven of which are in the British Museum, five in the Bodleian Library, Oxford, three at Lincoln's Inn, one in Gray's Inn, and one in the National Library at Paris, and, with the exception of one of these MSS., they all exhibit an interpolation, which renders the passage even more confused than the text, as it stands in the printed book of 1569. The exception is furnished by MS. Rawlinson, C. 160, in the Bodleian Library, Oxford, the text of which is as follows, folio 134, b. col. 2:—

"Rex vicecomiti salutem, Si talis fecerit te securum
" &c. tunc summone per bonos summonitores XII li-
" beros et legales homines de visneto de tali villa,
" quod sint coram justiciariis nostris ad primam assi-
" sam, cum in partes illas venerint, parati sacramento
" recognoscere, si talis pater vel avunculus vel amita
" vel soror ipsius talis fuit seisitus vel seisita in do-
" minico suo, ut de feodo, de tanto terræ et tanto
" redditu cum pertinentiis in tali villa, *de quibus obiit*
" *seisitus post ultimum reditum Regis Johannis pa-*
" *tris nostri de Hybernia in Angliam*, et si predictus
" talis ejus hæres propinquior sit," etc.

Such, indeed, was the form of the writ of mortdancestor before the Statute of 3 Edw. I. under which statute the limitation was altered in this manner:

"And forasmuch as it is long time past since the writs
" undernamed were limited; it is provided, that in
" conveying a descent in a writ of right, none shall
" presume to declare of the seisin of his ancestor further
" or beyond the time of King Richard, uncle to King

" Henry, father to the king that now is; and that a " writ of novel disseisin, of partition which is called " *nuper obiit*, have their limitation since the first voyage " of King Henry, father of the king that now is, into " Gascoin. And that writs of mortdancestor, of cosin- " age, of aid, of entry and of nativis have their limita- " tion *from the coronation of the same King Henry and* " *not before.* Nevertheless all writs purchased now by " themselves or to be purchased between this and the " feast of St. John, for one year complete, shall be " pleaded from as long time, as heretofore they have " been used to be pleaded."

A year was thus allowed for the continued use of the old form of writ, and no alteration has been introduced in the form of the writ by the scribe of MS. Rawlinson C. 160, in the treatise de assisa mortis antecessoris. We cannot, however, argue from this that the MS. itself, as it stands, was written before the conclusion of A.D. 1274, (4 Edw. I.) but the use of the old form of the writ raises a presumption, that it was copied from a MS. written before that time. In fact another MS. namely Rawlinson C. 159, which has already been referred to, and of which the handwriting is considered by experts to be rather older than the legal handwriting of C. 160, contains a form of writ altered after this manner: " —parati sacramento recognoscere, si talis pater vel " mater, avunculus vel amita, frater vel soror ipsius " talis fuit seysitus in dominico suo, ut de feodo, de " tanto terræ cum pertinentiis redditus in tali villa " *die quo obiit, et tempore regis Edwardi fuit ter-* " *minus iste ad coronationem domini Henrici regis* " *patris ipsius Regis Edwardi, si obiit, post ultimum* " *reditum regis Johannis patris nostri Hibernia in* " *Angliam*, et si prædictus talis propinquior hæres ejus " sit." This latter MS. is an interesting MS., as a blank folio of parchment at its commencement exhibits on its reverse side an inscription in two lines, in a fourteenth

century hand. H. Bratonus de legibus et consuetudinibus et statutis Angliæ de librario Sancti Augustini Cantuarie. The text however of this MS. affords no clue to the author's name, *Ego talis* being the reading of cap. I, § 3. The alteration, which is made in the body of the writ of mortdancestor in this MS., is evidently the result of a blunder of the scribe, who has sought to incorporate into the text an imperfect side-note, which was appended to an older MS.

The Editor also ventures to think, that the scribe of MS. Rawlinson C. 160 had before him a MS. of Bracton's work, of an earlier date than the MS. or MSS. from which any other of the extant MSS. have been copied. He founds this opinion, in the first place, on the fact that the text of C. 160 is purer than the text of any other MS. It has supplied a correct reading for every incorrect reading in the printed book of 1569, as far as the text comprised within the present volume is concerned, and it is to be noted, that the editor of the printed book states, that he had collated not fewer than twelve ancient MSS. In the second place, MS. Rawlinson C. 160 contains some folios in the second book "De acquirendo rerum dominio," which are not found in any other MS., and which formed evidently a substantive portion of the MS. from which it was copied, although unfortunately a folio has been cut out of the volume, and its absence mars the integrity of the text, which is on the subject of the Degrees of Consanguinity, and was probably a copy of the treatise, as originally drawn up by Bracton. The missing folio appears to have been absent from the MS. for some considerable time, and before the folios were numbered, and its absence has not been noted, when the folios were numbered consecutively 36 and 37, although the edge of the missing folio which should come in before folio 37 is still visible, and there is an hiatus in the text. In support of the opinion, that these folios on the subject of consanguinity may have been a portion of the treatise,

as originally prepared by Bracton, the following considerations seem to be of weight. If the reader will refer to folio 68 b. of the printed volume of 1569, and to page 544 of the present volume, he will find at the end of the second clause of Chapter xxxi., to which is appended a side note, "Of the persons of those who ought to succeed "to others, and of the order of succession," the following passage :—

"Et qualiter gradus cognationis computentur, & quo gradu, quis distet ab alio in linea descendente vel ascendente, in figura *superiùs* in arbore ante principium libri picta manifestiùs quasi ad oculum apparebit."

Unfortunately the promise of the text has not been kept as regards this MS., as no such painted tree of consanguinity is prefixed to the volume, any more than to several other MSS. which the Editor has examined, and which exhibit the same reading.

There is, however, another class of MSS., of which the Galeaczo MS. in the National Library in Paris is the finest and most interesting specimen, which exhibit another reading, namely, "in figura *inferius* depictata "manifestius quasi ad oculum apparebit." No MS., however, with which the Editor is acquainted, contains any such tree of consanguinity painted at the end of it; not even the Galeaczo MS. itself. It may be presumed, however, that there were at one time or other MSS. corresponding to these two classes of MSS., in which respectively there was inserted either at the commencement or at the conclusion a painted tree of consanguinity. The MS. Rawlinson C. 160, on the other hand, belongs to a third and, as the Editor thinks, an earlier class, namely, a class in which the tree of consanguinity was described as inserted in the text itself in the place where reference is made to it, and *in which it was in fact so inserted*, as in the case of MS. Rawlinson C. 160. A coloured tree, as it is termed, of consanguinity is

depicted in the text of this MS. at the top of folio 37 b., column I. and the details applicable to its various branches have been discussed in ten columns, four of which were written on the missing folio and six are still preserved on folios 37, 37 b., and 38. The text, on the other hand, as set forth in the printed book of 1569, folio 68 b., is continued on folio 38 b. of this MS., and there is prefixed to that text at the top of column I. of the same folio, the title "De Hæredibus, qui succedunt, non ex "successione, sed substitutione per modum donationis." This title forms the side note of the present volume, p. 546. It is in consideration of this tree of consanguinity and its place in the text, "accedamus nunc ad arborem" is the language of the author, that the Editor proposes to class MS. Rawlinson C. 160 by itself, and to constitute three classes of the most ancient MSS. according as the tree was inserted bodily in the text, or was painted at the commencement, or was otherwise painted at the conclusion of the book. Rawlinson C. 160 would thus appear to stand alone as an example of the first class of MSS. There may, however, be other specimens of this class to be found amongst the thirty-five MSS. which are known to exist in England, some of which the Editor has not had an opportunity hitherto to examine.

There are MSS. in the British Museum and also in the Bodleian Library, Oxford, the writing of which, according to the judgment of experts, is somewhat earlier than the handwriting of Rawlinson C. 160. In fact, another Rawlinson MS. in the Bodleian Collection, which is numbered in the catalogue Rawlinson C. 159, to which we have already alluded as having belonged to the monastery of St. Augustine at Canterbury, belongs, in the judgment of Bodley's Librarian, to a period somewhat earlier than that to which Rawlinson C. 160 may be assigned; yet the text is not so pure. Other MSS. now extant of Bracton might also be cited as probably in an

earlier handwriting, so that we may safely conclude that the respective ages of the MSS. now extant furnish no safe criteria of the period, at which the work was composed. The state of the law, as described by the author himself, is one of the best criteria, coupled with his silence as to important alterations in the law made by certain statutes, seeing that he has not omitted to notice certain constitutions and statutes, such, for instance, as the provisions of Merton, enacted respectively in 18 H. III. and 20 H. III. The internal evidence supplied by this silence is suggestive that the work was composed before 43 H. III. The author, for instance, not only passes over in complete silence the important provisions of a statute enacted at Westminster in that year on the subject of feudal tenures and actions concerning dower and advowsons, but he expounds the old law (legem Angliæ) which was in force before that statute, and he cites a judgment of Willelmus de Ralegh in affirmance of that law. Further, he states the law as to homicide *per infortunium* without noticing the important changes made in that law by the provisions of 43 H. III., "quod murdrum de cætero non "adjudicetur in regno, ubi infortunium tantum modo "præsentetur, sed locum teneat de interfectis per fe- "loniam et non aliter." We cite the substance of this great change in the criminal law from an entry made before the judges itinerant in 45 H. III., in which the record speaks of the law as "de novo provisum per "consilium domini regis." Bracton, however, is not merely silent as to any change in the law having been made in 43 H. III., but in folio 135 he speaks of an usage to the contrary being observed in some places, "licet in quibusdam partibus de consuetudine aliter "observetur." No such usage, however, could have been properly upheld by the king's justiciaries after 43 H. III. anywhere within the realm. It has been suggested by some critics, that political reasons may have weighed with Bracton in not noticing the provisions

enacted at Westminster in 43 H. III. by reason of the royal prerogative having been curtailed by the provisions of Oxford of 1258, which had been forced upon the king. But the statute or provisions of Westminster were published and ratified by the king himself on the feast of St. Edward 1259, and there is no good reason for supposing, that the mitigation of the law of homicide remained a dead letter, until it was re-enacted by the statute of Marlbridge 52 H. III. The Editor is so far of opinion that Professor Güterbock has good grounds for maintaining, that the provisions of Westminster of 1259 were not known to Bracton, when he composed the treatise entitled "De Corona" in the printed book of 1569. The conjecture that the work of Bracton, as it stands, was completed before 1259, finds some further support in the circumstance, that from a record published in Madox's History of the Exchequer, vol. ii. p. 257, it appears that Henricus de Bratton was required in the year 1259 (42 H. III.) to return to the archives the Rolls of "Martinus de Pateshell and Willielmus de Radleye," which, it may be presumed, he had in his possession while drawing up his Treatise de Itinere Justiciariorum. Willielmus de Radleye is, no doubt, the same judge whom Bracton frequently quotes as Willelmus de Ralegh, who was one of the king's justiciaries.

Professor Güterbock's work has been translated into English from the German by Mr. Brinton Coxe, of Philadelphia, who has appended some valuable notes from his own pen in addition to those from the pen of the learned Professor. Mr. Coxe has observed in a note to Chapter I. of the Professor's book: "The consideration "of Bracton's doctrine concerning the king's being "suable is not without interest in connection with the "date of the authorship. From Bracton's own remarks, "folio 171 b. and folio 212, it would appear that redress "from the king was not attainable by suit or action "against him, but only by way of petition. From what

" is said fol. 382 b., it appears that where the king was " a warrantor, he could not be vouched to warrant, " because, ' non potest vocari, sicut vocantur privatæ " ' personæ, quia summoneri non potest per breve.' " Bracton's remarks, however, upon folio 171 b. are " qualified by the following striking passage: ' Nisi sit " ' qui dicat, quod universitas regni et baronagium suum " ' hoc facere debeat, et possit in curia ipsius regis.' " This passage was probably written between the Parliaments of 1255 and 1258. The Parliament of 1255 exacted from the King certain concessions, which he refused peremptorily to confirm, but which he was compelled at the subsequent Parliament of Oxford in 1258 to ratify with other concessions. By these later provisions of Oxford he was subjected, as his father John had been in 1215, to the controul of a standing executive council, and the result of his endeavours to shake off this controul was the subsequent civil war, which ended in the re-establishment of his former authority. It is interesting historically, that the possibility of a compulsory limitation of the royal authority should have been foreshadowed in this passage of Bracton, if it were written at the time, when the revolutionary measures attempted at Oxford in 1258 were in prospect or in agitation.

Of the early training, which Bracton underwent, and by which he acquired such a masterly acquaintance with the common law of England, reputed to be a sacred treasure stored up in the breasts of the king's justiciaries, we have glimpses in the favourable language, which he always makes use of in speaking of the judgments of Martinus de Pateshull, sometime Chief Justice of the Bench. Mr. Reeves in his history of the English law has observed, whilst commenting on Bracton's text, that it is probable that in matters of fact Bracton relied on his own experience or the information of those, whom he personally knew, for he quotes no decision of a court or opinion of a lawyer but of Henry the Third's reign, though one of

them is as early as in the third year of that king's reign. Mr. Reeves would seem to have overlooked the fact that Bracton cites a judgment delivered in the reign of King John by Martinus de Pateshull :—" Habetis de itinere " M. de Pateshull in comitatu Leycestrie de tempore " regis Johannis," fol. 364 b. No year, however, is mentioned. The text of the Rawlinson MS. C. 160, also enables the Editor to fix the date of another case, as cited by Bracton from the earliest records of the judges itinerant in the reign of Henry III., immediately after the close of the war between Henry III. and Louis IX. of France. This war, which at one time threatened the throne of Henry, came to an end on Sep. 11, 1217, six weeks before the conclusion of the first year of Henry III. Peace was signed at Kingston in Surrey, and as the King was a minor, and, as such, had no seal, the charter, by which he confirmed all the franchises and customs enjoyed by his subjects in the time of his predecessors, was sealed with the seals of the Papal Legate and of William, Earl of Pembroke, the High Marshall of the Realm, and the guardian of the young King. Immediately upon the conclusion of this peace, the circuit of the judges itinerant appear to have been resumed. No mention is made in the case above cited, fol. 77, of the Justiciary, who conducted the assize, but in a later part of the work, f. 390, allusion is made to the iter of Martinus de Pateshull by name and his associate judges in different counties immediately after the war to dispose of the cases, which stood over for judgment from the reign of King John. It would appear, that at this time the itinera of the King's Justiciaries were held twice in the year, to wit, in Trinity Term and in Michaelmas Term respectively, and as the roll of the iter of Trinity Term, 1218, is described as the *second* roll after the war, f. 302, it is not unreasonable to assign the date of the roll of the *first* pleas held after the war to Michaelmas term 1217, before the commencement of the second year of Henry III. It

would thus appear, that Bracton's earliest recollections of cases is associated with the circuits of Martinus de Petershull, commencing, as we have seen, with an iter of that judge in the Reign of King John, and continuing from the first year to the sixteenth year of Henry III. Martinus de Pateshull was Dean of St. Paul's and Chief Justice of the Common Pleas, or, as that high functionary was then called, Capitalis Justiciarius de Banco, and was the most remarkable judge of his time. Bracton speaks of him twice in terms of great familiarity, calling him simply Martinus (quod melius est secundum Martinum, f. 205 b.), or Dominus Martinus (Dominus tamen Martinus assisam cepit de divisis, f. 207 b.). From the frequent mention of this judge down to the last of his circuits, and from the unvarying tone of approval, with which Bracton cites his decisions, the Editor feels encouraged to suggest that Martinus de Pateshull was the Gamaliel, at whose feet Bracton sat during many circuits of the judges itinerant, and from whose judgments and consultations Bracton acquired his remarkable knowledge of the principles of the Common Law. It has been thought by some indeed, that Bracton taught the Roman Civil Law at Oxford in the earlier part of the thirteenth century, and Dr. Arthur Duck, in his treatise, De usu et auctoritate Juris Civilis, 1654, says "Erat enim Bractonus juris Cæsarei Professor "Oxonii." That Bracton was competent to teach Roman Law from the Professor's Chair at Oxford requires no further evidence, than what is supplied by himself in his Second Book, which follows the order of teaching observed in the Institutes and the Digest of Justinian, and in which he shews himself to have been profoundly versed in the works of one of the most famous of the Gloss-writers (Glossatores), namely Azo, of Bologna. The reputation of the Summa of Azo, which is frequently quoted by Bracton, was so great, than in more than one of the great cities of Italy, a Doctor of Civil Law could

not be appointed to the office of judge, unless he possessed a copy of Azo's work. Hence the proverb cited by Diplovataccius: "Chi non ha Azzo, non vada a "Palazzo."

There can be no doubt from the frequent quotations, which Bracton makes from Azo's writings, that he had qualified himself for the office of judge according to the Italian canon by the possession of a copy of Azo's work. He cites "the Summa" by name "ut in Institutis ple- "nius inveniri poterit et in Summa Asonis," fol. 10, and although the earliest class of MSS. has only the words "in Summa," the name of Azo being omitted, as noted in p. 76 of the present volume, there can be no doubt that Azo's work is here intended. If there were trustworthy evidence, that Bracton, before he became one of the king's justiciaries, read public lectures on the Roman law in the University of Oxford, that circumstance would account for his intimate acquaintance with that law, and his systematic treatment of the Chapters "de "Rerum Divisione" and "de Acquirendo Rerum Domi- "nio" after the method of Azo, and we should probably not be very wide of the mark in conjecturing, that these chapters in their original form were the substance of readings at Oxford by "Magister Bracton," for so he is styled by Gilbert de Thornton, the Chief Justiciary, who published an abbreviation of Bracton's work in 1292 (20 Edw. I.), and that they were delivered from the chair, which had previously been made famous by the readings "of "Magister Vacarius."

It would probably be not too venturesome, if the Editor were to suggest, that the immediate object, which Bracton had in view in composing his work, was to draw up a manual of the common law of England for the use and instruction of the Justiciaries of the Eyre. The earlier work, with which the name of Glanville is connected, whether it was drawn up by the great justiciary himself, or under his direction in the reign of

Henry II., was confined almost entirely to matters relating to the practice of the Curia Regis, and to the general principles of law most frequently applied in cases before that high court. Its author states, that it was impossible in his time to reduce into writing all the laws of the realm, not merely on account of the ignorance of the scribes, but on account of the multitude and the confusion of the laws. He is therefore content to give a short sketch of the course of proceding and the forms of writs used in the Curia Regis, to assist the memory of those who took part in the administration of the law, and he discusses the principles of feudal right for the most part incidentally in their bearing on the rules of legal procedure.

It has been customary to consider Glanville's work as the crown of the new jurisprudence introduced by the Normans. Reeves inclines to the opinion that the work was drawn up at the command of Henry II. in order to perpetuate the improvements made in the law by the practice of his reign. Its effect, however, was not to stereotype the law, nor do we conceive its intention to have been such, on the contrary, it has been well said by the Comte de Beugnot in his Introduction to the Assises de Jerusalem, published by the French Academy in 1841, that Glanville was animated by the same spirit, which actuated the consuls of Milan in the reign of the Emperor Frederick I. in publishing their work on the feudal jurisprudence of Lombardy in the interval between 1158 and 1168. This work, of which the name of the authors, Obertus de Orto and Gerardus de Niger, have been preserved to us, together with the substance of their work, in the treatise entitled Consuetudines Feudorum, or Liber Feudorum,[1] gave the first

[1] This work was annexed to the Corpus Juris Civilis in the thirteenth century, by Hugolinus de Presbyteris, a professor of the University of Bologna during the reign of the Emperor Frederick II., and

impulse to an attempt to reduce into writing the traditions and usages of the feudal system, and to subject to the laws of reason practices, which had hitherto known no law, but that of force. Glanville's work was the first step made in England in the direction of reducing into an intelligible system the compromise effected between the ancient Anglo-Saxon customs and the Norman usages. It was composed about the same time as the most ancient *Coustumier* of Normandy, which may have shortly preceded it.[1] We cannot fix the date of Glanville's work with accuracy further than that it must have been composed between 1180 and 1190, inasmuch as Glanville became chief justiciary in 1180, whilst his death occurred in 1190, at the siege of Acre.

The title of the work is "Tractatus de Legibus et "Consuetudinibus Regni Angliæ," and M. Houard in his edition of it amongst the ancient French laws has added the words "tempore regis Henrici II. compositus, "justiciæ gubernacula tenente illustri viro Ranulpho "de Glanvilla, juris regni et antiquarum consuetudi-"num eo tempore peritissimo. Et illas solum leges "continet et consuetudines, secundum quas placitatur "in curia regis ad scaccarium et coram justiciis, ubi-"cunque fuerint." It has been a general belief, that the writer of this work was the chief justiciary himself, and it has been conjectured by Biener, who has written an able treatise on the English jury system (Das Englische Geschwornengericht), that the work is incomplete, probably in consequence of Glanville's premature death. There is no difficulty in supposing that the qualities of a great expert in the law under the

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it is found in all editions of the Corpus Juris Civilis, subsequent to that time.

[1] An edition of this work was published by M. Marnier, in his Établissements et Coutumes, Assises et Arrêts de l'Echiquier de Normandie au xiii. siècle, Paris, 1839.

feudal system might be united in the same person with the qualities of an able commander of the King's armies, as Glanville led the forces of the Crown more than once, and was the commander, who took the King of Scots prisoner. We know as a matter of fact that in England during the Anglo-Norman period the practice was for the duties of the king's chancellor to be discharged by an ecclesiastic, and the office of the chief justiciary to be filled by a layman, and the history of the restoration of the Assises of the High Court of Jerusalem during the reign of King Amauri IV. of Cyprus, who succeeded to the throne in 1194, is very instructive on this subject, as it shows that during the period of the Crusades the most famous warriors were amongst the most famous jurists of their day.

During the seventy years, which elapsed between Glanville and Bracton, the English law had undergone great development, and had acquired a somewhat artistic organisation in the hands of the judges itinerant. New forms of action had come into use, judicial decisions were accessible in the records of the assises and were recognised as authoritative expositions of the common law, and thus became productive sources of law, whilst the works of the gloss-writers, which were in general circulation, contributed to foster a scholastic spirit amongst the English lawyers themselves, and thus the law had reached in the reign of Henry III. a stage, when it was capable of being developed into a science, and where a clear knowledge of it could only be acquired by a systematic study of its principles. But a condition precedent to any such systematic study of its principles was, that the law itself should be reduced into writing. Such a work appears from the introductory remarks of Bracton to have become highly needful in his time, not merely for the guidance of the practitioners themselves, but for the protection of suitors from the ignorance and arbitrary will of foolish and unlearned persons, "who,"

to use Bracton's own words, "ascend the judgment seat " before they have learnt the laws."

Bracton's own account of his method of inquiry is that, as it was useless to attempt to enlighten the ignorance of an older generation, he had undertaken for the instruction at least of the rising generation to examine the ancient judgments of righteous men, and by reducing their acts, consultations, and answers into a summary under titles and paragraphs to commend them to perpetual memory by the aid of writing. Custom also, he says, is sometimes observed for law in parts, where it has been approved by habitual usage, and it fills the place of law, for the authority of long usage and custom is not slight, and this more especially, he observes, in counties, cities, boroughs, and vills, where it will always have to be inquired, what is the custom of the place and in what manner they, who allege a custom, observe the custom. He does not attempt to deal at any length with these various customs, although he alludes to some of them by the way, as to the custom of the ville of Ipswich, f. 12, and to the custom of the county of Lancaster, f. 330, which Martinus de Pateshull approved and upheld.

It is a subject of regret as regards our knowledge of the ancient laws of England, that so few of the ancient Customaries of the English cities and boroughs have been preserved to our time. The Liber Custumarum of the city of London, which has been published in the Rolls series, is an exception to this remark; and the Domesday of Ipswich, which has been published in the second volume of the Black Book of the Admiralty, also in the Rolls series, may be mentioned as another exception, and of which the text, as stated in a note to the present volume, p. 93, may serve to correct the reading of a passage in Bracton's work.

The work as arranged in the printed edition of 1569 is divided into five books, and such is the distribution of the work in most of the MSS., although the Fletewoode

MS. in the Bodleian Library, Oxford, and one or two others, are exceptions. The first book is entitled de Rerum Divisione, the two first chapters of which are introductory, and set forth the motives of the author in composing his treatise. The three next chapters treat of right, in the abstract under the various heads of natural right the right of nations, and civil right; and it is in the sixth chapter that the author begins to deal with the laws and customs of England, according to which the right, which it is his intention to discuss, appertains either to persons or to things or to actions, and as persons are of the greater dignity, he treats of them first in order. The subject of persons and of their rights occupies four chapters, and it is not until the twelfth and last chapter of this book that the author treats of things, and makes a division of them as conducive to the better explanation of them. There does not seem to be any good reason why the treatise should break off here, as the same subject is continued in the next following book, which commences, "Dictum est supra de "rerum divisione, nunc autem dicendum est, qualiter "dominia rerum acquiruntur."

It is obvious on a careful examination of this opening part of Bracton's treatise, that it has been designed after the model of Azo's Summa on the Code and Institutes of Justinian. The scientific influence of Azo's views and doctrines, especially in the definitions and divisions of legal notions and conceptions, is clearly discernible throughout this first book, and in some places the very words of Azo are made use of, and this peculiarity of the work is traceable elsewhere, and it may be said, nearly throughout the whole of the following books. The Editor, with the object of illustrating this remark, has appended side notes from time to time in the present volume to enable the reader to compare the text of Bracton with the writings of the famous Bolognese jurist. It must not, however, be supposed that Bracton

in copying Azo's work was seeking to corrupt the law of England by incorporating into it novel doctrines borrowed from the Roman civil law, as M. Houard has contended in his collection of Traités sur les Coutumes Anglo-Normandes, from which he has purposely excluded Bracton's work on that alleged ground. Mr. Spence, in his able work upon Equitable Jurisdiction, has taken a more just view of the question, when he holds the Roman law, which is incorporated in Bracton's work, to have been part of the common law of England in the reign of Henry III. Professor Güterbock, to whose highly scientific labours in tracing the relations of Bracton to the Roman law we have already alluded, states that his own investigations have led him to adopt a view essentially the same as that of Spence. The external historical evidence, he observes, as well as the internal evidence of Bracton's work itself demonstrates, that no inconsiderable part of the Roman civil law must have been practically applied in England in Bracton's day. The same evidence also shows, that Bracton has in general only reproduced those Roman elements of law, which he found actually received in England in his time. Mr. Reeves has ventured an opinion that Bracton has introduced Roman law into his system, merely as an external ornament and an embellishment of scientific learning, but this view can hardly be reconciled with the practical object, which Bracton asserts himself to have in view, namely, to expound the law of England for the use of English judges, and to explain to them and to teach them in what manner and in what order suits are decided "secundum "leges et consuetudines Anglicanas." Further, his materials are English materials, "facta et casus, qui quotidie "emergunt in regno Angliæ," and his most frequent sources and authorities are the judicial decisions of the King's Court at Westminster or of the judges itinerant on their circuits. Bearing in mind these facts, the Edi-

tor agrees with Professor Güterbock in holding that it is difficult to explain, why Bracton should have made use of Roman law to the extent to which he has done, if it was a foreign law, which had no roots in English soil before. It would have been on the one hand useless to the judges, and on the other hand misleading to students of law. Yet in many places he discusses Roman elements of law as integral parts of the laws and customs of England; he cites Roman authorities in some instances in the same familiar manner (*e.g., ad hoc facit*) as English judgments, and in a few particular cases, after stating English judicial precedents, he illustrates them by direct quotations from the Digest of Justinian. The discrimination, with which Bracton in some cases makes use of Roman principles, not importing into the subject the whole Roman law, but only portions of it, cannot well be attributed to accident, but may be reasonably accounted for by his desire to reproduce only such portions of the Roman, law as had become part of the consuetudinary law of England; and the same explanation holds good, where in certain passages, apparently borrowed from the Roman law, we find slight variations of the text. To treat these variations as instances of misquotation would probably be an injustice to Bracton; they are rather to be regarded as evidence, that a principle of the Roman law had undergone some modification in practice to adapt it to the peculiar circumstances of the realm of England.

But the object of Bracton was not merely to make the law known in the stage of culture, at which it had arrived in his time, but to lay down principles for the improvement and development of it, and with this view, as care was now bestowed on the transcript of judicial records and in the preservation of them in Rolls, he appeals to the decisions of the King's Justiciaries as recorded in those Rolls, as the best evidence of the binding force of certain legal principles, and as furnishing legal

rules for future observance. We have passed, when we join company with Bracton, the infantile state of law, when judgments rendered on a state of facts were the only sources of law, and we have reached a more advanced stage, which he describes in these words: "Si autem ab-" qua nova et inconsueta emerserint, et quæ prius usi-" lata non fuerint in regno, et tamen similia evenerint, " per similia judicentur, cum bona sit occasio a simili-" bus procedere ad similia." Hence the great care, with which Bracton cites judicial decisions, and disentangles principles from them, employing them both as evidence of the law, and as points of departure for its development and improvement. It would perhaps be too hazardous to assert, that the value of such decisions, as legal authorities, had not been recognised in practice anterior to Bracton's time. But Bracton is the first writer, who recognises overtly the judgments of the courts as furnishing not merely *rules* for the decisions of similar cases, but *principles* which should be applied to analogous cases, and in citing their judgments he appears to have taken care to have the Rolls themselves before him. He has been thus enabled frequently to cite intricate matters both of fact and of law, and we know from the contemporary records of the Exchequer already alluded to, that he was allowed free access to the Rolls.

The important influence, which Bracton's treatise exercised upon his contemporaries, and the readiness, with which the writers immediately succeeding him adopted his work as a model, deserve also to be taken into consideration in appreciating his use of the Roman law, and in confirming the view, that where he uses it without expressly noticing it as such, he uses it as English law. It would be an error to suppose that, in admitting the application of Roman principles in England in the time of the Plantagenets, we are bound to concede to the Corpus Juris Civilis any legislative authority

in England. The Roman civil law, in many matters, if we take for instance the doctrine of possession as an example, already crops up, to borrow a term of art from physical science, in Glanville's work. The distinction between proprietary right, carrying with it possession, and so constituting legal possession as contrasted with actual corporeal possession, is found in English as well as in the Roman Law. It might indeed be difficult, as Güterbock observes, to prove that the theory of possession in England, or the appearance of possession as a peculiar institution of English law, was connected with the introduction of the Roman law. But there can be no doubt of the Roman character of the doctrine of possession, as expounded by Bracton and adopted in Fleta, and that it is to be regarded not merely as the law of England at that time, but as the basis of subsequent legal development on that subject. The English doctrine of possession is in fact based and developed upon Roman notions and ideas, and Bracton treats the subject from the same point of view as the contemporary civilian school. On the other hand, in discussing usucaption (a conception evidently originating with the Roman law), Bracton makes no use of the Digest, nor of the works of the gloss-writers, for the Roman terminology was properly applicable to legal institutions, which never obtained a firm footing in England. Hence some caution is required on the part of the reader when Bracton is found using such terms as fructus, usus, and usufructus, as in the instance of a *firmarius*, a grantee for a term, in whose case he employs *usus* and *usus-fructus* in contradistinction to *proprietus* and *feodum*, and not in connection with any particular principle of the Roman law of realty.

Bracton's acquaintance with the Canon law is also patent on the face of his work from various direct quotations from the Decretum of Gratian and from the Decretals of Pope Gregory IX. He also refers to the

Lateran Constitution of 1179 (temp. Alexander, III.), as governing the appointment to vacant churches, whilst the right of patronage was in dispute. It should be observed, that many of the decretals of Gregory, which refer to the right of patronage, were specially addressed to England, and that the peculiarities of the law of England were not overlooked in the framing of the papal rescripts in answer to English petitions. Thus it is generally considered that in the title of the decretal de jure patronatus C. 21, the words "occasione laicæ re- "cognitionis" have special reference to the English assise of last presentation, which Bracton has discussed in the second treatise of his fourth book. The criminal law of England, also in Bracton's time, contained much that was borrowed from the Canon law. The proceeding per famam patriæ, fol. 148, and the law of homicide, fol. 120 b, and fol. 121, are justly regarded as having such an origin, and there can be no doubt that the procedure of the English Courts had been framed before Bracton's time in many particulars after an ecclesiastical model. Examples of the influence of the Canon law on English procedure are descernible in the proof of charters by witnesses, fol. 396, in the challenges of the *jurata*, fol. 105 and in the *presumptio ex semiplena probatione*, fol. 302. But Bracton, although he renders to the lord the Pope what he considers to be due to his supremacy in spiritual matters, defends the rights of the secular power against the encroachments of the Church with a courage remarkable in an ecclesiastic of that period, and he defines the respective spheres of the spiritual and the secular jurisdictions without any inclination to favour the former or to disparage the latter. We find him careful in explaining how an excess of authority on the part of the Courts Christian might be restrained by a writ of prohibition from the lord the King, in spite of letters from the lord the Pope himself, whilst, on the other hand, he shows how the

king's courts willingly lent their aid to enforce the sentences of the ecclesiastical ordinary in matters properly within his sphere. Thus, when an offending party had been excommunicated for contumacy by the ecclesiastical court, and remained in such contumacy for more than forty days, the Crown willingly issued a writ to the sheriff to capture the offender and imprison him, until he should submit to the ecclesiastical court, and this was done, as stated in the writ itself, fol. 427, not from any deference to the Canon law, but secundum consuetudinem Angliæ. On the other hand, the conflicting views held at Rome and in England concerning the legitimacy of children, as bearing on their capacity to inherit, if they had been born before the marriage of their parents, are fully set forth by Bracton, and he enters into special details respecting the statute of Merton (20, Henry III.), where the bishops voted in the affirmative for the legitimation of such children, whilst the counts and barons answered, "una voce, quod noluerunt leges Angliæ mutare, quæ usque ad tempus illud usitatæ fuerunt et approbatæ," f. 417.

That the law of England was in conflict with the Canon law of Rome on this subject in Glanville's time we know from his statement of the fact:—"Et quidem, "licet secundum canones et leges Romanas talis filius "sit legitimus hæres, tamen secundum jus et consue-"tudinem regni nullo modo tanquam hæres hæredi-"tate sustineatur," Glanville, vii. 15. Bracton himself states the law of England to the same effect in his second book, but in so peculiar a manner as to render it probable, that this portion of his treatise de acquirendo rerum dominio may have been originally drawn up by him before the statute of Merton (20 H. III.) was passed. Bracton's words are, Sequitur videre qualiter illegittimi legittimantur, et sciendum, quod si quis naturales habuerit filios de aliqua, et postea cum eadem contraxerit, filii jam nati per matrimonium subsequens

legittimentur et ad omnes actus legitimos idonei reputantur, sed tamen non nisi ad ea, quæ pertinent ad sacerdotium; ad ea vero, quæ pertinent ad regnum, non sunt legittimi, nec hæredes judicantur, quod parentibus succedere possunt *propter consuetudinem regni*, quæ se habet in contrarium, fol. 63. If the tone, in which Bracton treats the subject in this treatise, is contrasted with the tone of a later passage in his treatise de Exceptionibus (which is the last treatise of his work), fol. 416, in which he enters fully into the proceedings of the Parliament of Merton (20 H. III.), the contrast is suggestive that, when Bracton dealt with the question of legitimation post subsequens matrimonium in the earlier part of his work, the provisions of Merton on the subject had not been enacted. The fact, that he refers to certain provisions of Merton on the subject of dower in the same treatise de acquirendo rerum dominio, fol. 96, does not cause any difficulty, for they are cited as provisions of 18 H. III.,[1] and must not be confounded with the more famous provisions of Merton of 20 H. III., commonly spoken of as the Statute of Merton, being in other words the provisions of a great Council of the Realm, at which both the bishops and the barons were present. That Bracton had very well defined views respecting the limits of papal authority within the realm of England, and that according to his opinion it could not overrule a custom of the Realm in temporal matters, may be gathered from a remarkable passage written by him with a boldness, which would have been hardly becoming in an ecclesiastic, if he had not been at the same time a justiciary of the Crown. "Ad papam et ad sacerdotium quidem pertinent ea quæ "spiritualia sunt, ad Regem vero et ad regnum ea quæ "sunt temporalia, juxta illud, 'Cœlum cœli domino, "'terram autem dedit filiis hominum." Et unde ad "papam nihil pertinet, ut de temporalibus disponat vel

[1] It has been suggested by Blackstone that these provisions were enacted in the Parliament of Tewkesbury (18 H. III.).

" ordinet, non magis quam reges vel principes de spirit-
" ualibus, ne quis eorum falcem immittat in messem
" alienam. Et sicut papa ordinare potest in spirituali-
" bus quoad ordines et dignitates, ita potest rex in tem-
" poralibus de hæreditatibus dandis vel hæredibus con-
" stituendis secundum consuetudinem regni," fol. 416 b. Such a defence of the rights of the secular power was to be expected from one who had sat at the feet of Martinus de Pateshull, who, himself a clerk, did not hesitate to submit a question of legitimation per subsequens matrimonium to a *jurata* in a Kent Assize (xi. Henry III.) f. 417, notwithstanding the rescript addressed by Pope Alexander III. (C. 6 X. qui fil. 4, 17), to the Bishop of Exeter, which lays it down that matrimony has a retrospective effect in legitimating offspring " tanta vis est ma-
" trimonii, ut, qui antea sunt geniti, post contractum ma-
" trimonium legitimi habeantur." Bracton does not omit to notice the compromise on this subject between the Bishops and the Barons, under which it was arranged, that the Ecclesiastical Courts should continue to try the question of fact, whether the issue was born before or after matrimony, without touching the question of law, whether such issue was bastard or legitimate.

We have discussed the contents of Bracton's first book. His second book treats of the acquisition of the dominion of things, and he treats first of all in the three first chapters of the ratio naturalis of acquisition, and when treating of the natural modes of acquisition, he refers to the writings of the Romans as the best sources of law on this subject. In the fourth chapter he treats of the acquisition of property ex jure civili, and thereupon proceeds to discuss the various forms of donation, which he describes as " magna, celebris, et famosa causa adquisi-
" tionis." This discussion is continued in the preceding chapters down to the end of the twenty-sixth. Donation according to Bracton was an alienation of property from motives of pure liberality under no compulsion of right.

It might be absolute or conditional, and in this respect Bracton's discussion of it is in conformity with the principles of the Roman Law, Dig. l. xxxix. Tit. V. It would appear, as if the Roman Law on this head had struck deep roots into the English system in Bracton's time. Thus, Glanville is silent as to the prohibition of "donationes "inter conjuges," whereas Bracton cites a decision of the Judges Itinerant in 8 H. III., declaring such donations to be invalid, and subsequent judgments in 15 H. III., and 17 H. III. to the same effect, fol. 29. The English law of dower gave to the wife upon the death of her husband a third of his lands and tenements for her lifetime, and no prohibition applied to the *dotis constitutio* on the part of the husband, which was identical with the Roman donation propter nuptias, fol. 29 b., but how the Roman prohibition of post-nuptial donations came to be received in England we have no clear information, and there is reason for supposing that it was introduced by the judges to supplement the common law, which in respect of dower agreed with the Roman law. Fleta, in treating this question, rests the prohibition expressly on the Roman law, "quia hoc prohibetur in lege:" 3. § 12. Again donations post factam feloniam were null and void by English law, and Bracton points out the agreement on this subject between the English law and the provision of the Digest, but on this head there would seem to have been a custom of England grounded on the principle of feudal escheat, which was in complete harmony with the Roman law. "Convenit lex cum consuetudine "Anglicana," f. 30 b., are Bracton's words. Again, the delivery of the *res donata* was a necessary condition of the old law of England stated by Glanville VII. 1, and Bracton connects the same principle "non valet donatio "nisi subsequatur traditio," partly with the theory of the old English law as to *nuda pacta*, and partly with the Roman maxim "traditionibus et usucaptionibus rerum dominia "transferuntur." Other features of Bracton's

treatment of the subject of delivery might be readily cited to shew how intimately it is connected with the Roman rules of "traditio." It presupposes always a just cause to give it validity, and it conferred on the new possessor no better right than the donor himself had possessed.

The discussion of "donation" terminates with donations "*mortis causa*," with which Chapter 26 of this book concludes. The next two chapters are occupied with the discussion of purchase and sale, in other words, acquisition *ex causa emptionis*, and of letting and hiring, which Bracton describes as the next thing to buying and selling. These chapters require no comment, but the next following method of acquiring the dominion of things *ex causa successionis*, is more important, and occupies 10 chapters, folios 62–96. Under this head Bracton treats of wardship and the legal relations incidental to tenure, namely, homage and relief. The English law of succession appears to have acquired about the end of the twelfth century a character so essentially national, that there was little ground, upon which the Roman law could operate with effect. Instead of the Roman universal succession according to the will of the testator, or the Roman provisions for intestacy, the English law divided the property of the deceased party into immoveables and moveables; and in the case of immovables the dying man was not allowed to make any disposition by testament. The text both of Glanville and of Bracton negative the existence of any testamentary power over land in their time, so that if any general power of devising land existed before the Conquest, it must have lapsed into desuetude or become abolished before the reign of Henry II., except where the privilege of free testacy was still maintained by local usage. The maxim of law as to immovables was thus expressed by Glanville, "Solus deus heredem facere potest, non homo," Glanville vii. 1. Further, the English law of succession gave a preference to the male line and to the eldest born,

which was unknown to the Roman law of intestacy, and it entirely excluded ascendants in the same line, or as Bracton states the rule, "Descendit itaque jus quasi "ponderosum quid cadens deorsum, recta linea vel "transversali; et nunquam reascendit ea via, qua "descendit, post mortem antecessorum," folio 62 b The order of succession, however, according to the law of England was influenced by the Roman law in one instance, namely, as regards the right of representation in the succession of descendants. Thus the important dispute, whether the younger son of a deceased person or his grandson by an elder son, who had predeceased him, should be preferred in the succession, turned upon this so-called right of representation. Glanville had adopted the view, that where the elder son had not been provided for by the grandfather, his grandson represented the elder son, who had a preferential right of succession to his grandfather, as against a younger son; and Bracton adopts the same view in the course of Chapter xxx. folio 64 b.: "Si autem frater antenatus in vita patris "communis obierit, relicto hærede de se, nepos vel "neptis ex eo incipiet esse in potestate avi, & hæres "propinquior avo, propter jus proprietatis, quod ei de-"scendit, quamvis gradu remotior, & unde, si avunculu "vel amita hæres propinquus & non propinquior "(quamvis gradu propinquior) extra seysinam petat "versus nepotem vel neptem, qui fuerit in seysina, "obstabit eis exceptio proprietatis, et quod hæredes "propinquiores esse non poterunt avunculus vel amita." It may deserve remark, that Bracton in speaking here of the preferential right of succession of the grandson, makes no allusion whatever to the case of King John, who on the death of Richard I. had asserted successfully his preferential right of succession, as a younger son, against Arthur of Brittany his nephew, the son of his elder brother Geoffrey, whilst in three other parts of the work he speaks of the *casus regis* as being in the way of

a judgment in favour of the nephew. Thus in treating of the writ of mortdancestor, f. 268, of the writ of cosinage, f. 282, of the writ of entry, f. 327 b., he cites the *casus regis* to that effect, and in the latter place he says expressly, " et cum de propinquitate constiterit, *quamdiu* " *casus regis duraverit*, nunquam ad judicium proce- " ditur." Now Eleanor of Brittany, the sister of Prince Arthur, died in 1241, after which time both titles to the Crown centred in Henry III., so that upon her death the justiciaries of the Crown may have no longer held themselves bound to refuse an assise to the nephew, as the true heir de jure against the uncle, if the latter was in possession of the inheritance. On the supposition that the treatises, which form the fourth book in the printed edition of 1569, were written by Bracton before he composed the treatise " De acquirendo rerum Dominio," there is no difficulty in reconciling his statement of the law in his second book, that if the uncle was in possession the nephew might take out a writ of consanguinity, or a writ of right against him, with his statements in the fourth book that *durante casu regis* no effect could be given to any proceeding to disturb the uncle.

With regard to the testamentary disposition of moveables, the determination of its validity rested with the ecclesiastical courts, for the Court of the King, to use the words of Bracton, f. 61, does not intromit itself into a testamentary cause any more than into a matrimonial cause, and the ecclesiastical courts followed the rules of the canon law, as distinguished from the Roman civil law in respect of the number of witnesses: — " Fieri au- " tem debet testamentum liberi hominis ad minus coram " duobus vel pluribus viris legalibus & honestis, cleri- " cis vel laicis, ad hoc specialiter convocatis ad pro- " bandum testamentum defuncti, si opus fuerit, si de " testamento dubitetur," f. 60.

The present volume breaks off where Bracton con-

cludes the subject of reliefs payable on succession to immoveables, and the following volume will commence with the subject of wardship. To have continued the volume to the end of Bracton's second book would have enlarged its bulk inconveniently, whilst there is no corresponding inconvenience in separating from it the chapters which treat of wardship, maritage, and dower, as they in fact might as well constitute an independent treatise, in accordance with the character of their distinct subject matter.

THE following TABLE exhibits the CONTENTS of the FIVE BOOKS, as arranged in the printed edition of 1569.

In primo libro tractatur, De Rerum Divisione.
In secundo libro, De acquirendo Rerum dominio.
In tertio libro, De Actionibus in primo tractatu.
In eodem libro, De Coronâ in secundo tractatu.
In quarto libro, De Assisis Novæ Disseysinæ in primo tractatu.
In eodem libro, De Assisis Ultimæ Præsentationis in secundo tractatu.
In eodem libro, De Assisis Mortis Antecessoris in tertio tractatu.
In eodem libro, De Consanguinitate in quarto tractatu.
In eodem libro, De Assisa Juris Utrum in quinto tractatu.
In eodem libro, De Dote in sexto tractatu.
In eodem libro, De Ingressu in septimo tractatu.
In quinto libro, De Breve de Recto in primo tractatu.
In eodem libro, De Essoniis in secundo tractatu.
In eodem libro, De Defaltis in tertio tractatu.
In eodem libro, De Warrantia in quarto tractatu.
In eodem libro, De Exceptionibus in quinto tractatu.

It has been remarked above that the silence of Bracton as to the changes in the law made by the Statute of 1259 (43 H. III.) in regard to actions relating to dower and the right of advowson, and in proceedings for the punishment of homicide *per infortunium*, coupled with the fact that he expounds the law on those subjects as it existed before 1259, and comments on its defects, leads to the inference, that his work was completed before that year. Some writers have regarded the reference to the case of Petrus de Sabaudia, heard before the King at Westminster in 46 H. III., which is found in certain MSS., as bringing the work down to 1262; but all English authorities are in accord, that as Bracton does not refer to the great changes in the law made by the Statute of Marlbridge in 1267 (52 H. III.), his work must assuredly have been completed before that year. The Editor of the present volume inclines to Professor Güterbock's view, that the internal evidence on the whole warrants us in preferring the earliest of of the above dates, viz., A.D. 1259. Whichever opinion on this subject is the most entitled to weight, and whatever may be the true explanation of the arrangement of the treatise as an aggregate work divided into five books, in the form in which they appear in the printed edition of 1569, we have trustworthy evidence in an independent document of 4 Edw. I. that the work was in high estimation in that year. Thus Selden cites the following letter, which relates to the loan of a copy of the work made by the Bishop of Bath in that year to Archdeacon de Scardeburg:—"Universis præ-
" sentes literas inspecturis R. de Scardeburgh, archidia-
" conus, salutem. Noveritis me recepisse et habuisse, ex
" causa commodati, librum quem dominus Henricus de
" Breton composuit, a venerabili patre, domino R. Dei
" gratia Bathon. episcopo, per manum magistri Thomæ
" Becke, archidiaconi Dorset; quem eidem restituere
" teneor in festo Sancti Johannis Baptistæ anno

" Domini MCCLXXXVIII. In cujus rei testimonium præ-
" sentibus sigillum meum appensum. Datum Doveræ
" die Veneris post Purificationem Virginis gloriosæ
" anno MCCLXXVII." Seld. ad Fletam 2 § 2. The loan of the MS. would thus appear to have been made from the 2nd February 1277 to 21st June 1278, for a period of nearly five months, as the year then began on 25th March; and the personage who was the possessor of Bracton's work and lent it on this occasion to the archdeacon was Robert Burnell, Lord Chancellor of England from 1273 to 1292, appointed Bishop of Bath in 1275. It is possible that this MS. may still be in existence. For the purpose of its identification the Editor ventures to suggest that the writ of mortdancestor in the Treatise de Assisa Mortis Antecessoris should correspond in form with the writ as set out in MS. Rawlinson, C. 160, of which the Editor has supplied the text in p. xix of the present Introduction.

List of MSS. collated or referred to in the present Volume.

Additional MSS. in the British Museum, No. 11353.—A folio of 189 leaves, measuring 14 × 9¼ inches, written, in double columns, in a court hand of the latter part of the 13th century. With a table of contents prefixed. The colophon is: " Explicit liber H. de Bractoñ de legi-
" bus et consuetudinibus Anglicanis.

" Que quidem plura sunt sparsim tradita iura
" Hec nunc scriptura facili monstrat tibi cura."

The first page of the text (f. 9) is ornamented with a painted border, at the top of which is a miniature representing the king seated on his throne, delivering the sword to a group of knights who stand on his right, and a charter to a company of men and women seated on his left.

A pencil note at the beginning, dated 28 Sept. 1815,

describes the volume as "a MS. of Bracton de Legibus, " from the library of Sir Thomas Crewe, Kt., who was " King's Sergeant in the time of James I., A.D. 1624," " bought at the Harrold sale, Sep. 1805. J. B." The name of Charles Buck is written on a fly-leaf at the end, in a hand of perhaps the end of the last century.

Royal 9 E. xv., in the British Museum.—A folio of 216 leaves, measuring $12\frac{3}{4} \times 9\frac{3}{4}$ inches, written in double columns, in a hand of the 13th or 14th century. With a contemporary table of contents, written in a court hand, prefixed. At the end of the work are added, in the same hand as the text, a few short passages on " quo warranto," &c., and two deeds concerning Ireland in 1279.

Harley 3416, in the British Museum.—A folio of 208 leaves, measuring $13\frac{1}{4} \times 8\frac{3}{4}$ inches, written in double columns, in a hand of the first half of the 14th century. *Imperfect;* wanting 12 leaves at the beginning, and having a mutilated table of contents at the end. This MS. is annotated very fully throughout by a hand of the end of the 15th century.

Harley 3422, in the British Museum.—A folio of 227 leaves, measuring $12\frac{1}{2} \times 8\frac{1}{2}$ inches, written in double columns, in a hand of the first half of the 14th century.

Additional 24,067, in the British Museum.—A folio of 221 leaves, measuring $14\frac{1}{2} \times 9\frac{1}{4}$ inches, well written, in a hand of the first half of the 14th century. With illuminated grotesque scrolls on the first page, and coloured initials to each book. This MS. belonged to Chertsey. On a fly-leaf, at the beginning, is the note: "Liber qui " dicitur Bretton [corrected by a later hand into Brac- " ton] de perquisicione Fratris Thome de Ocham"; and at the end (f. 221 b.) is the following memorandum:— " I Edward Lee, the kynges almoner, have borrowed " this booke of my lord Abbote of Cherteseye, and pro- " myse the same to restore to hym whan so ever he or anye for hym or in the name of his monastere woll

" require it. Witnesseing this my owne hand and sub-
" scription, the iiijth of October 1530.

" Edouarde Lee, Almoner."

Add. 21614, in the British Museum.—A folio of 204 leaves, measuring 14 × 9 inches, written in double columns, in a hand of the first half of the 14th century. The colophon is as follows: — " Laus tibi sit Christe,
" quoniam liber explicit iste. Jam bene completur
" opus hoc, scriptor veneretur. Pupplica sit sua laus
" in eo quod nulla latet fraus. Et quoniam domini
" placitum perfecit in omni. Donum suscipiat quod
" sibi sufficiat." With an illuminated border round the first page. On the fly-leaf at the beginning is this note: —" Liber monasterii Glastonie de perquisito bone me-
" morie Walteri de Monitona quondam abbatis ibidem,
" in quo continetur videlicet Henricus Bractoñ de iuri-
" bus et consuetudinibus Anglie. Secundo folio. *Et*
" *maiori.*" (A.D. 1341–1374.) The last words being a reference to the words, with which the second leaf of the MS. begins. The abbot's initials, W. M., surmounted by the letter A and an abbot's mitre, are at the foot of f. 2 b. The arms of Sheldon, of Besley, co. Worcester, are stamped on the covers.

Harley, 656, in the British Museum.—A folio of 315 leaves, measuring 14 × 8½ inches, written, in double columns, in a court hand early in the 14th century. With a table of contents, in a different hand, added at the beginning. On the back of the last leaf is a portion of a terrier of lands in county Dublin, *temp.* Edw. III. The MS. formerly belonged to Sir Simonds D'Ewes.

Harley, 653, in the British Museum.—A folio of 213 leaves, measuring 14 × 9 inches, written in double columns, in a court hand, early in the 14th century. Imperfect at the end. A table of contents is written in a later hand on the fly-leaves at the beginning. A fly-leaf at the end is a portion of a notarial deed dated at York, 1411. Belonged to Sir Simonds D'Ewes.

Harley 763, in the British Museum.—A small folio of 134 leaves, measuring $12\frac{1}{4} \times 8$ inches, written in double columns, in a court hand, early in the 14th century. Imperfect both at the beginning and end.

Harley 1242, in the British Museum.—A folio of 224 leaves, measuring $14\frac{1}{4} \times 9\frac{1}{4}$ inches, written in double columns, in a hand of the 14th century. With a table of contents at the beginning. At the top of f. 1, in a hand of the 15th century, is the name "Bacon, owner."

Harley 817, in the British Museum.—A folio of 239 leaves, measuring $14\frac{1}{4} \times 8\frac{3}{4}$ inches, written in double columns, in a court hand of the early part of the 14th century. With a table of contents at the beginning. The colophon is: "Explicit *Breton;*" and beneath it is written "Simon de Ednesouere," who appears to have been the scribe of the MS.

MS. Rawlinson C. 160, in the Bodleian Library, Oxford.—A folio of 230 leaves, measuring $13\frac{1}{2} \times 9\frac{1}{4}$ inches, written in double columns, in a court hand of the early part of the 14th century, without any table of contents prefixed to it. The volume is imperfect, ending with the words "laicum feodum per quod distringi possit," which are part of a writ addressed to the Bishop of London. This writ is identical with that which occurs in folio 443 of the printed book, being paragraph 9 of the last chapter but one, namely, cap. 32. The first page of the MS. is slightly illuminated, the painting at the bottom representing a duel between two men on horseback armed with spears before a judge or umpire, who is in the centre of the page, seated with a drawn sword in his right hand, whilst three women are standing on his right hand making vows for the success of the righteous cause. This is the MS. which, in the Editor's opinion, deserves to be classed by itself, in consideration of the extreme purity of the text, and of the fact that it contains a tree of consanguinity painted in the body of the text, with a MS. account of the law of

consanguinity differing from that which occurs in any other MS. The case before John de Metingham is not mentioned in this MS. (fol. 26, printed edition), nor the case of Petrus de Sabaudia (fol. 86 b., *ibid.*), which have caused difficulties in fixing the period when Bracton composed his works. It is unique in respect of its containing the Capitula Itineris Justiciariorum, drawn up immediately after the Statute of 3 Edward I., in other words the Statute of Westminster the First.

MS. Rawlinson C. 159, in the Bodleian Library, Oxford.—A folio of 204 leaves, originally numbered as 199 leaves, the table of contents not having been counted. It measures $12\frac{1}{2} \times 8\frac{1}{2}$ inches, written in double columns, in a hand of the end of the 13th century, with a table of contents at the beginning. The MS. is complete, ending with the words, "sive præceptum habuerit sive "non." On the reverse of the first folio, which is otherwise blank, is the inscription, "H. Bratonus de legibus "et constitutionibus et statutis Anglorum de librario "St. Augusti Cantuarie," in a hand of the 14th century. At the bottom of the last folio is an inscription in a 17th century hand, "Itt was my father his booke, "and lay in hys studdy att Sarjeant's Inn. H. Manwood." The MS. does not appear to have been divided into books before the latter part of the 16th century, when a division corresponding to the division of the printed book of 1569 has been introduced in a handwriting of that period. The first page is slightly illuminated, whilst the initial letters of the paragraphs are coloured blue and red. It is bound in vellum, and was formerly locked. The text is not so accurate as that of MS. Rawlinson C. 160, neither does it contain the painted tree of consanguinity, nor the Articles of Inquiry of the Judges Itinerant drawn up after 3 Edw. I. Bodley's Librarian considers it to be in an earlier handwriting than C. 160, but the text is certainly not so pure.

MS. Corbet, otherwise Bodley 170, in the Bodleian

Library, Oxford, a tall quarto of 305 leaves, measuring $10\frac{1}{4} \times 6\frac{3}{4}$ inches, written in double columns in a court hand of the latter part of the thirteenth century or early fourteenth with a table of contents prefixed to it. The volume, is perfect and there is a colophon at the end: " Explicit liber domini Henrici di Bracton de legibus " et consuetudinibus Anglicanis. Ludere non." On the first page at the head of the table of contents or rather on the margin above it is the name " Joannes " Corbet," and on the reverse of the last are the lines, " Codex Corbetti dominum non muto libenter, illi " charus eram, charus et ille mihi." On the right-hand margin of the first page of the table of contents in a more modern hand are the words, Novris 4to. 1719. Liber Bibl. Bodl. ex dono magistri Hodges, Coll. Oriel Socii. This MS. is remarkable from two circumstances, the text of Lib. 1. c. 3, exhibits the names of the author " Ego H. de Bractone talis animum erexi," whilst the work itself, according to the table of contents, is divided into five books. These books, however, do not correspond at all with the five books of the printed edition of 1569, for instance, the first book contains 259 paragraphs or chapters and breaks off with the subject, de divisione jurisdictionum sacerdotii et regni, with which chap. 8, of the third book, de actionibus, concludes in the printed book. At the end of the table of contents, which consists of 11 folios is the colophon, Explicit kalendar. A blank page thereupon follows, after which the text of Bracton commences, having prefixed to it the Rubric, " Quæ sunt " regi necessaria. Incipit liber H. de Bractone de legi- " bus et consuetudinibus Angliæ."

MS. Fletewoode otherwise Bodley, 344, in the Bodleian Library, Oxford.—A small folio of 505 pages written in double columns in a hand of the fourteenth century. It has a table of contents prefixed to it, and it is divided into *centuriæ*. This is probably the MS. which Selden states to be divided into 1067 chapters.

MS. Rawlinson, C. 158 in the Bodleian Library, Oxford. —Folio, in an early hand of the fourteenth century.—The text appears to have been originally complete, but there are now many parts of it missing.

MS. Tanner, 189, in the Bodleian Library, Oxford.—A tall octavo, in a hand of the latter part of the thirteenth century. The first and last parts of the MS. are missing. This MS., which is catalogued as a Bracton and for that reason has been here mentioned, is in fact a portion of the Law treatise in the Anglo-Norman tongue known as Britton and Bretoun, which was composed in the reign of Edward I.

MS. Galeaczo, 4674 in the Bibliothèque Nationale in Paris, mentioned under that number in M. de Lisle's Cabinet des Manuscrits de la Bibliothèque Impériale, Paris, 1868.—It is a tall and very handsome folio of 211 leaves, written in double columns in a court hand of the early part of the fourteenth century. It contains, in addition to the text of Bracton, which occupies the first 170 leaves, various constitutions, writs, awards, charters and treatises, which carry forward the law of England to about 25 Edw. I. (1297). Amongst them are copies of Judicium Essoniorum, Fet à saver and Parva Hengham. Bracton's treatise is styled a "summa" of the laws and customs of England, and it is anonymous. The passage in Chapter 3 of the first book, in which the author explains the object of his work, is written: "Ego "talis animum erexi." The first portion of the MS. is divided into two parts. The first part numbered 1–6, contains a table of titles and paragraphs; the second part numbered i–clxiv., contains the text of Bracton. A later hand has divided this text into five books, the division of which corresponds in no respect with the division of the printed book of 1569. For instance, the first book contains 40 titles, the second 20 titles, the third 59 titles, the fourth 28 titles, and the fifth 17 titles. The treatise

of Bracton is complete, ending with the words "sive non "habuerit." The text contains the case of Petrus de Sabaudia (46 H. III.), and also the parenthesis noting the alteration of the time of legal prescription in cases of mortdancestor, which was introduced in 3 Edward I. The MS. although not amongst the oldest, is in other respects of great historical interest. There are inscribed on the last folio the words: "De regimine Principum de Lagaljça," which enables us to identify it as a MS. which once belonged to a Galeaczo, Duke of Milan. The foundation of the famous Library of the Dukes of Milan at Pavia is generally attributed to Galeaczo Visconti, who was Duke of Milan 1378, and was succeeded by his son John Galeaczo. M. de Lisle was at one time disposed to regard this volume with several others as having formerly found part of the Library of Pavia, of which Louis XII. carried away many valuable MS. to Paris. He has, however, latterly discovered in several volumes of what may be termed "Fonds Galeas" the characteristic marks of the Neapolitan library founded by Ferdinand I. King of Naples (1400), to whom many books were presented by his relative and ally Francis Sforza of Milan, and which Library was carried away to Paris by Charles VIII. of France, after his conquest of Naples. Under any circumstances the volume is of a noble and sumptuous character, and if it ever belonged to the famous library of Pavia or to that of Naples, it has found a fitting resting place in the Archives of the collection of the National Library of Paris. The Editor has to thank the French Government and M. de Lisle for their courtesy in sending the MS. to England for the Editor to examine it at his leisure. The attention of English jurists was called to this MS. for the first time by Mr. H. S. Milman of the Inner Temple, in an article on the ancient MSS. of English Law in Paris, which was published in the Law Magazine, New Series, vol. ii., 1873. The Editor has omitted to take the dimensions of this MS. before he returned

it to its proper depository, but it may be rightly termed a royal folio, or even an imperial folio.

MS. Hobhouse, in Lincoln's Inn Library.—A folio of 203 leaves, measuring 13 × 9 inches, written in double columns in a court hand of the latter part of the 13th or early part of the 14th century. It has no table of contents prefixed to it. On the upper margin of the first page is the Rubric, "Hic incipit Breton," and at the end, which concludes with "habuerit præceptum sive non," is the colophon:—

"Explicit iste liber, sit scriptor nomine liber,"
"Qui dum scribebat Roberti nomen habebat."

The volume, from an inscription preserved on the first flyleaf, belonged to Edward Henden, Sergeant-at-Law. It was bought at an auction of Mr. Le Neve's books, on March 1730, and again it was bought at an auction of Mr. P. C. Webbe's books on March 1771. It was presented to the library of Lincoln's Inn by Mr. Arthur Hobhouse, Q.C., a bencher of the Inn, now Sir Arthur Hobhouse, K.S.I. It is an early and useful MS., by far the best of the Lincoln's Inn MSS. as regards the aid, which it is capable of furnishing towards determining the correct text of Bracton's work in the form, under which it has been handed down to our time in the printed book of 1569.

MS. Hale, in Lincoln's Inn Library, folio of 138 leaves, measuring 13¾ inches × 9 inches, written in a single column across the page in a court hand of the latter part of the thirteenth century, with a table of contents prefixed to it. The volume is perfect, ending with the words, "sive inde preceptum habuerit sive non." On careful inspection, although the MS. commences with the first words of Bracton "In rege qui· recte regit "necessaria sunt duo," it proves to be an abbreviation of Bracton's work, and is divided into three centuries, the contents of which are set out in the table prefixed to the work, which is also divided inte three centuries. This manuscript belonged in the reign of Edward I. to Sir

Alan de Thornton, who appears to have resided in Lincolnshire, and was probably a relation, if not the son of Sir Gilbert de Thornton, who was Chief Justice of the King's Bench in 18 Edw. I. There are some curious memoranda on the fly-leaves, especially in relation to swans, and mention is made of Caburn, in Lincolnshire, which connects directly Sir Alan with Sir Gilbert de Thornton, as we know from an entry of a deed in the Placitorum Abbreviation, 17 Edw. I. that Sir Gilbert and his heirs acquired in that year a house and two acres of land at Caburn. A motto, in a recent hand, on the upper margin of the first page of the text, περὶ παντὸς τὴν ἐλευθερίαν has been held to indicate that the MS. once belonged to Selden. It does not, however, correspond with the abbreviation of Bracton made by Sir Gilbert de Thornton, which Selden describes as being in his own possession, and of which the division into books and chapters appears from Selden's account to have been altogether different. The MS. was bequeathed by Sir Matthew Hale to Lincoln's Inn library.

MS. Cholmeley, in Lincoln's Inn Library, a folio of 392 leaves, measuring 12 inches × 7½, in double columns, written in a hand of the latter part of the fourteenth century. It has prefixed to it a table of contents written on paper in a cursive hand of a more modern period. The name of the donor of the MS. appears in a writing curiously mounted within the morocco cover, in which the book is bound, under a piece of transparent horn:—"Bracton faire wrytten on parch-" ment. Ex dono Runulphi Cholmeley, servientis ad " legem et recordatoris civitatis London." The donor died on 25th April 1563, according to an inscription on his monument in St. Dunstan's Church, having been a frequent reader in the Inn. Two leaves of this MS., 30 and 31 are missing, apparently lost after the leaves were numbered, and before the table of contents was made out. The MS. is divided into five books, which

do not, however, correspond with the five books of the printed edition, inasmuch as the text of Bracton finishes with the conclusion of the fourth book at the bottom of fol. 344. The fifth book is made up of repetitions of various portions of Bracton's work, and ends with the words, "Est enim magna differentia inter regnum et "sacerdotium."

MS. Godbold, in the library of Gray's Inn.—A folio of 230 leaves, exclusive of the table of contents, measuring 12½ inches × 9 inches, in double columns, in a court hand of the early part of the fourteenth century. It has prefixed to it a table of contents of eleven leaves. At the head of the table of contents is the Rubric, Incipit liber Domini Henr. de Braton de legibus et consuetudinibus Angliæ. Further at the end of the table of contents is the colophon Explicit Kalendare Libri H. de Brattone. On the top margin of the next following leaf is the Rubric Incipit liber primus a Henr. de Brattone compositus de legibus regni Angliæ et consuetudinibus, primum capitulum que sunt regi necessaria et sunt duo arma et leges. The text of Bracton thereupon commences as in the printed book of 1569, and the volume is divided into four books, ending, "sive inde præceptum habiuerit sive non." On the back of the last folio but one are the names Jo. Godbold, and on the last folio, which is a fly sheet, in a more modern hand, John Godbold, Recorder of St. Edmunds Bury, in Suffolke, and Serjeante at Lawe. This work has in the body of the text of B. 1. ch. 3. the names of the author inscribed thus: "Ego Henricus de Brattone animum erexi."

MS. 6 Seat. A.–F. 15, in the Library of the Middle Temple.—It is a quarto, measuring 10 inches × 6¼, written across the page with the exception of the table of contents, which is written in double columns. The text of Bracton commences and ends as in the printed edition of 1569, and it is divided into five books, which correspond with the division of the five books in the

printed edition. It is in a court handwriting of the latter part of the thirteenth century. It has prefixed to the first chapter of the text on the side-margin the Rubric Incipit liber primus H. de Brattone. The table of contents is very instructive. It consists of 12 folios, to which is prefixed a title and prologue in the identical words of of the title and prologue of Glanville's work mutatis mutandis :—"Incipit tractatus de legibus et consuetudi-" nibus regni Angliæ tempore regis Henrici compositius, " Justitiæ Gubernacula tenente ab illustri viro Hen-" rico de Brattone juris regni et antiquarum consuetu-" dinum eo tempore peritissimo," &c. There is at the end a slight modification of the concluding words of the prologue of Glanville, after which, on the top of the first column on the reverse side of the first folio, there is this title: Capitula primi libri Henrici de Brattone de hiis quæ pertinent ad regem et regni gubernacula. The table then gives the headings of each chapter, and breaks off with each book as in the printed edition. The text itself preserves the anonymous character of the author: " Ego talis animum erexi " is the reading in B. 1. ch. 3. The Editor is disposed to think that this MS. is one of the twelve MSS. which the editor of the printed edition of 1569 had before him. Unfortunately, a portion of the fourth book is missing, which is noticed as missing in the table of contents.

There are various other MSS. in English collections, which the Editor has not, at present, had an opportunity to examine and for a brief notice of which he has to thank Mr. H. S. Milman of the Inner Temple, who has mentioned some of them in an Article in the Law Magazine, New Series, 1873. Amongst these may be cited a MS. in Merton College, Oxford; a MS. in Queen's College, Cambridge; four MSS. in the Library of the University of Cambridge; one in York Minster; two in the Library of Lambeth Palace; one in Worcester Cathedral; one formerly in the Stowe Library, now in the possession of

the Earl of Ashburnham; one in the Middle Hill collection of the late Sir Thomas Phillipps; one at Longleat in the possession of the Marquis of Bath; one at Stanford Court, in the possession of Sir Thomas Winnington. The text of many of these MSS. differs considerably from the text of the printed book, and the modes of dividing the chapters into books also exhibit some variety. The Merton MS., for instance, is divided into eight books. The Editor hopes to be able to give a fuller account of some of these MSS. on a future occasion. He has no reason to believe that any of them can compete with Rawlinson, C. 160 in the purity of its text, but some of these may be valuable in confirming the Editor's suggestion, that Bracton's work is an aggregate of treatises arranged in their present order some time after they were originally drawn up by the author. The problem which still awaits solution is, whether the treatises were arranged in the order, in which they present themselves in the printed book, during the lifetime of the author, or after his death, and the solution of this question may be considerably helped by the discovery of a MS., if any such exists, which observes that order, and of which the handwriting may be referred with reasonable probability to a period preceding 52 H. III. (A.D. 1267) when there is trustworthy evidence that Bracton was still alive. This is a subject which may well deserve the attention of the Historical MSS. Commissioners, and of the various personages or corporate bodies, in whose possession MSS. of Bracton have come or may hereafter come.

It remains for the Editor to add a few words in explanation of the plan of the work. It has been long a matter of complaint amongst the countrymen of Bracton at home, and amongst our brethren in the United States of America, that Bracton's Treatise on the Laws and Customs of England, in the only form in which it is accessible to the law student, is difficult to be met with,

and when met with, is found to be printed in a form which is so disagreeable to read and so inconvenient for reference that few persons care to consult the work a second time, and still fewer persons have the patience to peruse any large portion of its contents. A plea for a new print of Bracton was put forth in the Law Magazine in 1872, and Mr. H. S. Milman, the writer of the article, has not over-coloured his picture of the printed book of 1569, of which the edition of 1640 is only a reprint. He describes it as "a somewhat repulsive folio or quarto, " closely printed; a text, in form full of abbreviations, " in substance condemned two centuries and a half ago " by the most competent authority of his own, or per- " haps of any, age; references to certain books unrevised; " index, marginal abstract, every kind of grammatical " and historical light wholly wanting. These are the " conditions under which the student, if a classical " scholar, must read Bracton. If he be not a classical " scholar, he cannot read the book at all, for there is no " translation of it."

The desirability of an English translation, thus warmly advocated by Mr. H. S. Milman, has also been insisted upon by a high authority from the other side of the Atlantic. The Editor found, from a conversation which he had with Chief Justice Daly of New York in 1874, that there was a similar desire in the United States of America for a new edition of Bracton, subject to the condition that an English translation should accompany it. Under these circumstances the Editor has undertaken, with the approval of the Master of the Rolls, and under the sanction of the Lords Commissioners of H.M. Treasury, to prepare a new edition of Bracton, accompanied by an English translation, and supplied with many helps to facilitate the continuous study of the text, as well as to assist the practitioner in any occasional reference to it. The work has thus come to form part of the Rolls Series, and will extend over

several volumes. The Editor has meanwhile directed his labours in the first place to the mechanical improvement of the text of the printed book by the separation of the paragraphs, and by the insertion of marginal abstracts illustrating the contents of each paragraph. In the second place he has verified the references to the Civil and to the Canon Law and to the Summa of Azo, the great Bolognese gloss-writer, who was at the height of his fame at the commencement of the thirteenth century. In the third place, he has annexed, by way of side-notes, copious references to Glanville, Britton, and Fleta, and he has derived much aid in these matters from Mr. F. M. Nichols' recent and valuable edition of Britton. In the fourth place, he has subjected the text of the printed book of 1569 to a careful collation with the text of a MS. in the Bodleian Library, Oxford, which, upon an examination of the texts of more than twenty MSS., he has selected as containing the most accurate text.

This MS. has not failed to supply a correction for every existing error in the text of the printed book of 1569, as far as the present volume extends. The MS. in question is one of three MSS. of Bracton in the Rawlinson collection, and it has the press mark, Rawlinson, C. 160. It is in a court hand of the early part of the reign of Edward I. In the fifth place, the Editor has signalised certain additions to the text of Bracton, which form part of the text of the printed book of 1569, but which are not found in the earliest MSS. He has, however, by an oversight, omitted to note, p. 204, that the case of John de Metingham mentioned in fol. 26 of the printed book has no place in the Rawlinson MS. C. 160. J. de Metingham was not a Judge of the King's Bench until 1276, sometime after the original work of Bracton was probably completed. With regard to the text itself and the pageing of the work the Editor has studiously retained what he ventures to call the *classical* text of Bracton,

which has been generally received for more than three centuries, and which is cited in all law-books and commentaries, but he has subjoined to it in the form of annotations the corrections which have been supplied by the Rawlinson and other MSS. He has also retained, in addition to the ordinary pageing of the present volume, the ancient numbering of the folios, as adopted in the printed books of 1569 and 1640, which are in this respect identical. The folios will be found numbered, as of old, in the margin of the present volume, so that any passage referred to in any ancient law book may be at once identified by reference to the folio.

The Editor regrets that the progress of the present work, owing to the combined labour of translation and of collation, must be from its nature slow. He hopes, however, to be able to complete a volume in each successive year. He has meanwhile to lament the loss of one who took a deep interest in Bracton, and who was always most ready to aid the Editor with his kind counsel, and to place at his free disposal the ample stores of antiquarian research, which he had accumulated by his continuous study of our legal archives during a period of more than half a century. The recent death of Sir Thomas Duffus Hardy, Knight, the Deputy-Keeper of the Public Records, has created a gap in our authorities on the *origines* of English law, which it will be very difficult to make good. Men of letters have to thank him for having initiated under the direction of the late Lord Romilly the valuable series of ancient English chronicles and documents, now known throughout Europe as the Rolls Series, and to which he was himself a laborious contributor.

The Editor has to thank the Curators of the Bodleian Library, Oxford, for having placed several valuable MSS. at his free disposal for the purposes of collation, and likewise Bodley's Librarian, the Rev. H. O. Coxe, for his kind offices on various occasions.

He has to thank the Government of the French Republic and M. Delisle, formerly Director of the MS. Department, and now Director-in-Chief of the Bibliothèque Nationale in Paris for the use of a valuable MS. formerly belonging to the collection of the Dukes of Milan.

He has to thank the Benchers of Gray's Inn for the use of an interesting MS. formerly belonging to Serjeant Godbold, and likewise the Librarian of the Inn for his kind offices.

He has to thank the Benchers of Lincoln's Inn for the the use of two MSS., one of them having been the gift of Sir Matthew Hale and bearing Selden's motto on the margin of the first folio. It has some claim to be regarded as an abbreviation of Bracton's work executed under the auspices of Chief Justice Sir Gilbert Thornton. He has also to thank the Librarian of the Inn for his ready assistance.

He has also to thank Mr. E. Maunde Thompson, the Assistant Keeper of the MSS. in the British Museum for his valuable aid in examining and collating eleven MSS. of Bracton in the Museum, two of which, the Crewe MS. and the Glastonbury MS., are important MSS.

He has also to thank Mr. H. S. Milman of the Inner Temple for his instructive communications respecting more than fifteen MSS. of Bracton, which are preserved in various public and private libraries in England, and of which a list has been elsewhere set out. The Editor has not had time or opportunity to examine any of these MSS., but he has reason to believe that none of them are of a character superior to that of MS. Rawlinson C. 160 in the Bodleian Library. The Editor hopes to have more to say on the subject of these MSS. on a future occasion. He has also to thank the Librarians of the Middle Temple and the Inner Temple for their unvarying courtesy in facilitating his references to MSS. and to

printed books. Meanwhile he requests the critical reader kindly to make allowances for any defects, which may have been overlooked in carrying the present volume through the press.

The Temple, 1878. T. T.

PREFACE TO THE EDITION OF 1569.

PREFACE.

T. N. Candido lectori. S.

Jam diu et sæpe a multis legum nostratium studiosis, ut hic liber alicujus typographi honesta opera in publicum prodiret, vehementer optatum est. Rarus quidem et penes paucos, quasi conclusus latuit. Ea vero quæ extiterunt exemplaria, frequenti et varia transcriptione, multorum et verborum atque etiam sententiarum additione, quæ ab iis, in quorum manibus hic author versatus est, suæ memoriæ adjuvandæ causa adnotata, et a describentibus pro ipsius authoris verbis prave usurpata et inserta sunt, sæpissime autem indoctorum hominum et Latina saltem nescientium scriptorum inscitia (quod etiam plerosque alios vetustos scriptores, in inculto illo et superstitionum et ignorantiæ plenissimo seculo contaminavit) viciosa, dissidentia alia ab aliis, omnia multis et insignibus erroribus scatebant. Quo sane incommodo evenit, ut non sine magna difficultate et sumptu etiam, unum ex plurimorum collatione fidum exemplar collectum, recensque integrum, post examinationem diligentem multorum studiosorum et doctorum hominum opera factum, jam tandem descriptum sit. In quo labore a quamplurimis bonis, eorumque etiam quibusdam illustribus et honoratissimis viris, qui suos in hunc usum libros libenter, et ut verius dicam studiose, accommodarunt (quibus eo nomine, Lector candide, plurimum omnes debemus) egregie adjuti sumus.

Agit vero hic author de Jure, quod Commune hujus Regni vocamus. Justiniani Institutionum methodum,

juris nempe civilis Romanorum quoque peritus, videtur sibi ad imitandum proposuisse, ac eadem fere ratione ad leges Anglicanas commodo et perspicuo ordine tradendas progreditur. Quod ejus institutum, illis quibus in hoc genere indigesta confusio semper displicuit atque multum indies et molestiæ et impedimenti objicit, non potest non esse inprimis et jucundum et utile. Videmus quantum pauci illi libri quos eruditi nonnulli, non multi tamen, de Juris nostratis argumentis vel Titulis (ut vocant) aliquot recte et ordine non malo ediderunt, quales sunt Litletonus de tenuris, Fitzherbertus de Brevium natura, Stanfordus de Placitis Coronæ, et Regia Prærogativa, et ejus generis reliqui, studiosis in hac facultate tyronibus adjumenti afferant. Quanto magis recte dispositam et perspicuo facilique ordine ac methodo traditam totius hujus artis rationem atque epitomen ingenio nostro et memoriæ, tam ad intelligendum et judicandum quod de omni hoc studio sentiri debet, quam ad conservandum et retinendum quod in eo sumus assecuti, mirifice prodesse oportet? Sed de hoc plura dicere frustra erit: quod se hoc opus sua utilitate commendabit, satis esto. Hoc tantum te, lector, ne vel magno tuo periculo erres, vel nostra injusta infamia pecces, necessario admonendum censui.

Confectum est hoc opus ab illustri viro Henrico de Bracton, sub ultima tempora Regis Henrici tertii, trecentis circiter abhinc annis, haud multo postquam Rex Johannes Regium diadema suo capite detractum Pontificio legato in manus tradidit, seque ipsum Pontificis potestati permisit. Quo ex facto Romanus Pontifex, præter generalem illam quam in omnes Christiani orbis in Europa principes prærogativam cum insigni illorum injuria atque infamia superbissime exercuit, propriam sibi quandam in Anglia jurisdictionem eo ipso tempore vendicavit. Nihil igitur magnopere mirandum est, siquando hic scriptor in ecclesiasticis causis

pontificiam authoritatem (cui alioqui invictissimi etiam Imperatores et Reges cesserunt) coactus videatur admittere. Erat enim (ut omnibus perspicue constat) id vitium illorum temporum, et omnium tum prope communis error, cum universis fere gentibus crassissimæ tenebræ superstitionis et ignorantiæ obfusæ essent, et tunc ferme extinctum humanarum traditionum multitudine Evangelii lumen nondum tantas fraudes et tam injustum pseudo-apostolicæ tyrannidis imperium patefecisset. Nec sane poterunt tam obscuri et quasi fascinati vei potius captivi tamque recentis temporis quæcunque dicta falsissimam illam simulationem antiquitatis, quam huic tyrannidi affingunt, multum juvare.

Itaque si forte incides in ejusmodi aliquid, quod Pontificiæ favere authoritati videbitur (cujusmodi apud hunc authorem loci certe perpauci occurrent, et ii quidem ipsi non modo non diserte nec evidenter eum errorem confirmantes, sed et qui commoda explicatione potius ad justam potestatem regum tuendam possint adduci) admonendus es, lector, hoc ætati illi dandum esse, nec ob id istum nostrum scriptorem magis rejiciendum vel premendum fuisse, quam cæteros Annalium nostrorum de causis forensibus et actorum Parliamenti libros, qui iisdem temporibus editi fuerunt, quamque etiam multos magni nominis et alioqui bonos theologos ejus ævi, qui publico ejusdem universalis fere ignorantiæ quasi æstu ac secundo flumine abrepti, non solum papali tyrannidi succubuerunt, sed et turpissimas hæreses ab ipsius Papæ fontibus, vel potius sentina, haustas Christi meritis cum summa blasphemia adversissimas, et contra regum justa imperia et majestates quam maxime proditorie (si ita licet loqui) contumeliosissimas disseminarunt: Quorum tamen libri bona cum venia in manibus sunt, neque id injuria: semper enim eorum temporum quibus, vixerunt, habenda nobis ratio est, ut legentibus quod recte scripserint

commodo sit: si quid vero erraverint, temporis ipsius, nempe erroribus obnoxii, et adhuc recentis, nec magnæ antiquitatis, consideratio, tibi ad vitandos errores præsidio, illis ad excusandos, pro aliquo patrocinio sit. Nobis vero hæc protestatio nostra pro æquissima defensione habeatur, quod non eo edidimus, ut quicquam omnino per nos in vulgus spargatur, vel in falsissimæ tyrannidis papisticæ assertionem, quam merito abominamur; vel in justissimæ regiæ potestatis fraudem aut præjudicium, quam pro jure suo et officio nostro humillime et verissime agnoscimus; vel ad deceptionem tuam, lector, cui optime consultum volumus: hoc tantum consilio fecimus, ut tibi et reipublicæ prosimus, et ne quis, si quid immutatum vel omissum esset, papicolis, improbissimæ genti, ad calumniam locus pateret.

Præterea, lector, si quid, quod tum temporum pro lege habebatur, nunc recentiorum statutorum sanctionibus immutatum sit, vel aliis de causis justitiariorum opiniones ab antiqua sententia recesserint, memineris acta Parliamentorum consulenda, præsentibus vivendum statutis, præsentibus legibus obtemperandum; hujus, ut aliorum bonorum autorum, commodo ordine et recte traditis ad tuam utilitatem fruendum. Vale.

T. N.

A.D. M.C.LXIX.

VARIETATES LECTIONIS hujus operis ex fide duodecem librorum antiquorum descriptæ, quas his punctis (") in margine libri annotatas repperies.

Fo.	Ita legitur.	Aliter sic.
1.	" Usu armorum et præsidio.	Armorum podio.
9.	" Nativitatis suæ . .	vicinitatis suæ.
22.	" sive homagium . .	sine homagio.
24.	" sed sicut . . .	vel sicut.
36.	" saccum cum brochia .	sellam cum brothio.

Fo.	Ita legitur.	Aliter sic.
40.	" nihil jure . .	. nihil in re.
41.	" domino vendente	. domino tradente.
59.	" vel remaneat .	. nec remaneat.
59.	" non valebit .	. tunc valebit.
59.	" simplici confirmatione	simplici donatione.
59.	" licet juvari possit .	{ licet juvari non possit. / licet injuriari possit.
86.	" ad covey et key .	{ ad cofre et key. / ad cover et key.
87.	" saccum cum brochia	. sellam cum brothio.
89.	" aliquo modo .	. aliquo medio.
91.	" infra xiiii. annos	. infra xii. annos.
92.	" in Kanc. . .	. in Lanc.
92.	" dos parapherna .	. dos paraphernalis.
101.	" poterunt renovari	. poterunt revocari.
101.	" in contrarium .	. in contractu.
115.	" busones . .	. barones.
116.	" sothale quandoque filctale.	{ scothale quandoque Byldale. / quandoque Gildale.
118.	" illas habeat .	. illas tradidit.
122.	" Comites Paleys .	. Comites Palentynes.
124.	" ante iterum .	. ante iter.
124.	" fridhburgo . .	. fridithburgo.
126.	" audiri debet .	. audiri non debet.
147.	" de superiori labro .	{ desuper balluro. / desuper ballenro.
147.	" quædam dispensationes	quædam desponsationes.
150.	" petere ut adiratam	. petere ut indiratam.
153.	" Regis H. 46 .	. Regis H. 56.
177.	" non habebit talis	. habebit talis.
181.	" tamen alius ubi voluerit.	cum alius noluerit.
193.	" pater suus liber .	. pater suus villanus.
252.	" hæreditatis restitutio .	hæreditatis institutio.

Fo.	Ita legitur.	Aliter sic.
340	" qualiter redimuntur	. qualiter redduntur.
340.	" major præsens sit	. minor præsens sit.
351.	" infra quartum diem	. infra secundum diem.
359.	" mille et quadringenti	mille et quadraginta. mille et sexaginta.
359.	" quo summum planeta pervolvat circulum.	quo suum planeta devolvat circulum.
408.	" facta æditione sine scriptis.	facta æditione in scriptis.
441.	" excommunicationem minorem et pœnam.	excommunicationem minorem et perpetuam.

A.D. M.C.LXIX.

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[1] The side note of this paragraph has, by an oversight, not been inserted. The paragraph commences on p. 180, l. 19, "Quoniam alias quando revertitur," &c.

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HENRICI DE BRACTON

DE

LEGIBUS ET CONSUETUDINIBUS ANGLIÆ.

HENRICUS DE BRACTON

ON THE

LAWS AND CUSTOMS OF ENGLAND.

HENRICI DE BRACTON

DE

LEGIBUS ET CONSUETUDINIBUS ANGLIÆ.

LIBER PRIMUS.

Cap. I.

1. Quæ sunt regi necessaria.

Azo. in Institut. Proem. f. 1044.

In rege qui recte regit, necessaria sunt duo hæc, arma videlicet et leges, quibus utrumque tempus bellorum et pacis recte possit gubernari: utrumque enim istorum alterius indiget auxilio, quo tam res militaris possit esse in tuto, quam ipsæ leges usu armorum et præsidio possint esse servatæ. Si autem arma defecerint contra hostes, rebelles et indomitos, sic erit regnum indefensum; si autem leges, sic exterminabitur justitia, nec erit qui justum faciat judicium.

2. Quod sola Anglia usa est consuetudine et jure non scripto.

Britton Prolegom. Fleta, 16, 17.

Cum autem fere in omnibus regionibus utantur legibus et jure scripto, sola Anglia usa est in suis finibus jure non scripto et consuetudine. In ea quidem ex non scripto jus venit, quod usus comprobavit. Sed absurdum non erit leges Anglicanas (licet non scriptas) leges appellare, cum legis vigorem habeat, quicquid de consilio et de consensu magnatum et reipublicæ communi sponsione, authoritate regis sive principis præcedente, juste fuerit definitum et approbatum. Sunt autem in Anglia consuetudines plures et diversæ, secundum diversitatem

THE FIRST BOOK

OF

HENRICUS DE BRACTON

ON THE

LAWS AND CUSTOMS OF ENGLAND.

Chapter I.

1. What things are necessary for a king.

These two things are necessary for a king who rules rightly, arms forsooth and laws, by which either time of war or of peace may be rightly governed, for each of them requires the aid of the other, in order that on the one hand the armed power may be in security, and on the other the laws themselves may be maintained by the use and protection of arms. For if arms should fail against enemies who are rebellious and unsubdued, the realm will so be without defence, but if laws should fail, justice will be thereupon exterminated, nor will there be anyone to render a rightful judgment.

2. That England alone uses custom and unwritten right.

Whereas in almost all countries they use laws and written right, England alone uses within her boundaries unwritten right and custom. In England, indeed, right is derived from what is unwritten, which usage has approved. But it will not be absurd to call the English laws, although they are unwritten, by the name of Laws, for everything has the force of Law, whatever has been rightfully defined and approved by the counsel and consent of the magnates, with the common warrant of the body politic, the authority of the king or the prince preceding. There are also in England several and divers customs according to the diversity of places: For the

locorum : Habent enim Anglici [1] plurima ex consuetudine, quæ non habent ex lege ; sicut in diversis comitatibus, civitatibus, burgis et villis, ubi semper inquirendum erit, quæ sit illius loci consuetudo, et qualiter utantur consuetudine, qui consuetudines allegant.

3. Quæ causa inventionis hujus tractatus.

Cum autem hujusmodi leges et consuetudines per insipientes et minus doctos, (qui cathedram judicandi ascendunt antequam leges didicerint,) sepius trahantur ad abusum ; et qui stant in dubiis et in opinionibus multotiens pervertuntur a majoribus, qui potius proprio arbitrio quam legum authoritate causas decidunt ; ad instructionem saltem minorum, ego [2] Henricus de Bracton animum erexi ad vetera judicia justorum perscrutanda diligenter, non sine vigiliis et labore ; facta ipsorum, consilia et responsa, et quicquid inde notatu dignum inveni, in unam summam redigendo, sub ordine titulorum et paragraphorum (sine [3] melioris sententiæ præjudicio) compilavi, scripturæ suffragio perpetuæ memoriæ commendanda ; postulans a lectore, ut si quid superfluum vel perperam positum in hoc opere invenerit, illud corrigat et emendet, vel conniventibus oculis pertranseat, cum omnia habere in memoria, et in nullo peccare, divinum sit potius quam humanum.

f. 1 b.

Cap. II.

1. De Prohemio authoris.

In hoc autem tractatu, sicut in aliis tractatibus, considerandæ sunt hæc, quæ sit materia, quæ intentio, quæ utilitas, quis finis, et cui parti philosophiæ supponatur.

2. De materia hujus libri.

Et sciendum est, quod materia est facta et casus, qui quotidie emergunt et eveniunt in regno Angliæ, ut

---

[1] *Habet enim Anglia* is the reading of the MSS. Crewe, Glastonbury, and Galeaczo.

[2] *Ego talis* is the reading of all the earlier MSS. "Ego Henricus "de Bractone" is the reading of the Corbet MS., from Oxford. The Godebold MS., from Gray's Inn, has "Ego Henricus de Brattone."

[3] *sine præjudicio melioris sententiæ*, MSS. Cr., Gl., Gal., and Rawlinson.

English have many things by custom, which they have not by [written] law, as in divers counties, cities, boroughs, and vills, where it will always have to be inquired, what is the custom of the place, and in what manner, they who allege a custom, observe the custom.

3. What is the cause of composing this treatise.

Since, however, laws and customs of this kind are often abusively perverted by the foolish and unlearned (who ascend the judgment-seat before they have learnt the laws), and those who are involved in doubts and in [vague] opinions, are very frequently led astray by their elders, who decide causes rather according to their own pleasure than by the authority of the laws, I, Henricus de Bracton, have, for the instruction, at least of the younger generation, undertaken the task of diligently examining the ancient judgments of righteous men, not without much loss of sleep and labour, and by reducing their acts, counsels, and answers, and whatever thereof I have found noteworthy, into one summary, I have brought it into order under titles and paragraphs (without prejudice against any better system), to be commended to perpetual memory by the aid of writing; requesting the reader, if he should find anything superfluous or erroneously stated in this work, to correct and amend it, or to pass it over with eyes half closed, since to retain everything in memory, and to make no mistakes, is an attribute of God rather than of man.

Chapter II.

f. 1. b.

1. Of the author's preamble.

In this treatise, as in other treatises, these things are to be considered: what is the subject-matter, what the intention, what the utility, what the end [in view], and under what part of philosophy it ranks.

2. Of the subject-matter of is book.

It should be known, then, that the [subject] matter are the facts and the cases which daily emerge and happen in the realm of England, that it may be known

sciatur quæ competat actio, et quod breve, secundum quod placitum fuerit reale vel personale; et super hiis acta conficienda[1] sive irrotulationes secundum proposita et objecta, agendo et probando, defendendo et excipiendo, et replicando, et hujusmodi.

3. Quæ intentio.

Azo. in Inst. Proem. f. 1046.

Intentio autem authoris est tractare de hiis, et instruere et docere omnes, qui edoceri desiderant, qualiter et quo ordine lites et placita decidantur secundum leges et consuetudines Anglicanas, et de hiis habere tractatum, ut doceantur et corrigantur errantes, puniantur contumaces. Item communis intentio est de jure scribere, ut rudes efficiantur subtiles, subtiles subtiliores, et homines mali efficiantur boni, et boni meliores, tum metu pœnarum, tum exhortatione premiorum, juxta illud,

Hor. Epist. 1, xvi. l. 52.

"Oderunt peccare boni, virtutis amore:
"Oderunt peccare mali, formidinæ pœnæ."

4. Quæ utilitas.

Utilitas autem est, quæ nobilitat addiscentes, et honores conduplicat et profectus, et facit eos principari in regno, et sedere in aula regia, et in sede ipsius regis, quasi in throno Dei, tribus et nationes, actores et reos, ordine dominabili judicantes, vice regis, quasi vice Jesu Christi, cum rex sit vicarius Dei. Judicia enim non sunt hominis sed Dei, et ideo cor regis bene regentis dicitur esse in manu Dei.

5. Quis finis.

Azo. in Instit. Proem, 1046.

Finis hujus rei est, ut sopiantur jurgia, et vitia propulsentur, et ut in regno conservetur pax et justitia. Ethicæ vero supponitur, quasi morali scientiæ, quia tractat de moribus.[2]

6. Quis effectus.

Hujusmodi vero leges Anglicanæ et consuetudines, regum authoritate, jubent quandoque, quandoque vetant, et quandoque vindicant et puniunt transgressores;

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[1] *conficienda acta*, MSS. Cr., Gl., Gal., and Rawl.

[2] "Ethicæ supponitur liber iste, "quia tractat de moribus," Azo.

what is the proper [form of] action, and what is the proper writ, according as the plaint shall be real or personal, and what acts are thereupon to be completed, and what enrolments to be made according to the pleas and the objections, in accusing and in proving, in defending and in excepting, and in replying, and so forth.

3. What is the intention.

The intention of the author is to treat of those subjects, and to instruct and teach all persons who desire to be instructed, in what manner and in what order suits and pleas are decided according to the English laws and customs, and to compose a treatise on those subjects, that the erring may be taught and corrected, and the contumacious may be punished. Likewise, the common intention is to write concerning right, that the rude may be rendered subtle, and the subtle more subtle, and bad men may be rendered good, and good men better, as well by the dread of penalties as by the encouragement of rewards, according to the saying. "The good hate to sin from love of virtue, the bad hate to sin from dread of punishment."

4. What is the utility.

The utility also is, that it ennobles the learners, and it doubles their honours and their profits, and makes them to be promoted in the realm, and to sit in the king's hall, and in the seat of the king himself, as if in the throne of God, judging tribes and nations, plaintiffs and defendants, in lordly order, in the king's place, as if in Jesus Christ's place, for the king is the vicar of God. For judgments are not of man, but of God, and therefore the heart of a king, who rules well, is said to be in the hand of God.

5. What is the end.

The end of this thing is, that quarrels may be appeased, and vices may be warded off, and that peace and justice may be preserved in the realm; and it ranks under ethics as the science of morals, because it treats of habits.

6. What is the effect.

But English laws and customs of this kind, by the authority of kings, sometimes enjoin, sometimes forbid, and sometimes avenge and punish transgressors, and

quæ quidem cum fuerint approbatæ consensu utentium, et sacramento regum confirmatæ, mutari non poterunt nec destrui sine communi consensu et consilio eorum omnium, quorum consilio et consensu fuerunt promulgatæ. In melius tamen converti possunt, etiam sine eorum consensu, quia non destruitur quod in melius commutatur. Si autem aliqua nova et inconsueta emerserint, et quæ prius usitata non fuerint in regno, si tamen similia evenerint, per simile judicentur, cum bona sit occasio a similibus procedere ad similia. Si autem talia nunquam prius evenerint, et obscurum et difficile sit eorum judicium, tunc ponantur judicia in respectum usque ad magnam curiam, ut ibi per consilium curiæ terminentur; licet sint nonnulli, qui de propria scientia præsumentes, quasi nihil juris ignorent, nolunt alicujus consilium expetere; in quo casu honestius et consultius eis foret consilium habere quam aliquid temere definire, cum de singulis dubitare non sit inutile.

7. Quod sapiens esse debet, qui judicat.

f. 2.

Azo proem. ad Institut., p. 1043.

Sedem quidem judicandi, quæ est quasi thronus Dei, non præsumat quis ascendere insipiens et indoctus, ne lucem ponat in tenebras, et tenebras in lucem, et ne in manu indocta,[1] modo furientis, gladio feriat innocentem, et liberet nocentem, et ex alto corruat quasi a throno Dei, qui volare inceperit, antequam pennas assumat.[2]

8. Quæ sit pœna male judicantis.

Et cum quis judicare debeat et judex fieri, caveat unusquisque sibi, ne perverse judicando et contra leges, prece vel precio, pro temporalis lucelli commodo, æterni luctus mœstitiam sibi comparare præsumat; et ne in die furoris Domini sentiat ipsum vindicantem, qui ait, "Mihi vindictam, et ego retribuam," et ubi flebunt et

[1] *ne manu indocta*, Cr., Gl., Gal., Rawl.

[2] "Quoniam ex alto irremediabiliter corruit, qui volare satagit, "antequam pennas assumat," Azo.

when they have been approved by the consent of those who use them, and have been confirmed by the oath of kings, they cannot be changed nor abolished without the common consent and counsel of all those, by whose common consent and counsel they have been promulgated. They may, however, be converted into something better, for that which is commuted into something better is not abolished. If, however, any new and unaccustomed cases shall emerge, and such as have not been usual in the realm, if, indeed any like cases should have have occurred, let them be judged after a similar case, for it is a good occasion to proceed from like to like. But if such a thing never happened before, and the judgment is obscure and difficult, the judgment should be referred to the great court, that it may there be determined by the advice of that court, although there are some persons who, presuming on their own knowledge, as if they knew all matters of law, are unwilling to seek counsel of anyone, in which case it would be more becoming and more prudent for them to take counsel, than to decide anything at random, since it is not without advantage to have doubts in special cases.

7. He who judges ought to be a wise man. f. 2.

Let not one, who is unwise and unlearned, ascend the judgment seat, which is, as it were, the throne of God, lest he convert darkness into light and light into darkness, and lest with a sword in the untaught hand, as it were, of a madman he should slay the innocent and set free the guilty, and lest he tumble down from on high, as from the throne of God, in attempting to fly, before he has acquired wings.

8. What is the punishment of evil judging.

And when a person is obliged to judge and to be a judge, let him take care for himself, lest by judging perversely and against the laws, through entreaties or for a price, for the advantage of a paltry temporary gain, he presume to bring upon himself the sadness of eternal grief, and lest in the day of the fury of the Lord he feel the vengeance of him, who has said, "Vengeance is mine,

plangent reges et principes terræ, cum viderint Filium Hominis, propter timorem tormentorum ejus, ubi aurum et argentum non valebit liberare eos. Quis autem non timeat illud examen, in quo erit Dominus accusator, advocatus, et judex, a sententia autem sua non poterit provocari? Quia Pater omne judicium dedit Filio, qui claudit et nemo aperit, aperit et nemo claudit. O districtum judicium, quo non solum de actibus, verum etiam de omni verbo otioso, quod inique loquuti fuerint homines, reddituri sunt rationem! Quis ergo effugere poterit a ventura ira? Mittet enim Filius Hominis angelos suos, qui colligent de regno Dei omnia scandala, et eos qui faciunt iniquitatem, et ex eis alligabunt fasciculos ad comburendum, et mittent eos in caminum ignis, ubi erit fletus et stridor dentium, gemitus et ululatus, ejulatus, luctus, et cruciatus, stridor et clamor, timor et tremor, dolor et labor, ardor et fætor, obscuritas et anxietas, acerbitas et asperitas, calamitas et egestas, angustia et tristitia, oblivio et confusio, tortiones et punctiones, amaritudines et terrores, fames et sitis, frigus et camina, sulphur et ignis ardens in secula seculorum. Caveat igitur quilibet judicium illud, ubi judex terribiliter districtus, intolerabiliter severus, immoderate offensus, vehementer iratus, sententia ejus incommutabilis, carcer irremeabilis, tormenta sine fine, sine intervallo, et sine temperamento,[1] tortores horribiles qui nunquam lassescunt, nunquam miserentur, timor rerum conturbat, conscientia damnat, cogitationes increpant, et fugere non licet; unde beatus Augustinus: "O quam magna peccata mea sunt nimis! "unde cum quis Deum habuerit justum judicem, et con- "scientiam suam testem, nihil timeat nisi causam suam."

[1] *sine temperamento*, omitted Cr.

and I will repay," and when king's and princes of the earth shall weep and bewail, when they behold the Son of Man, through fear of his torments, when gold and silver will not avail to set them free. Who, indeed, would not fear that examination in which the Lord will be the accuser, the advocate, and the judge, and from his sentence there shall be no appeal possible. For the Father has given all judgment to the Son, who shuts and no one can open, who opens and no one can shut. Oh! strict judgment, in which men shall have to render account, not only for their acts but for every idle word that they have unrighteously spoken! Who then shall escape from his coming wrath? For the Son of Man shall send his angels, who shall separate from the kingdom of God all scandals, and those who work iniquity, and shall bind them into bundles to be burnt, and shall send them into a furnace of fire, where there shall be weeping and gnashing of teeth, groans and howlings, cries, weepings and tortures, hissing and screaming, fear and trembling, pain and labour, burning heat and fetid smells, darkness and anxiety, bitterness and roughness, calamity and want, straitness and sadness, forgetfulness and confusion, twistings and prickings, sorrows and terrors, hunger and thirst, cold and heat, sulphur and blazing fire for ever and ever. Let each, then, beware of that judgment, when the Judge will be terribly strict, intolerably severe, immoderately offended, vehemently angered, and his sentence will be unchangeable, his prison without any return from it, his torments without end, without interval, and without assuagement, his tormentors horrible, who never grow weary, who never pity when fear disturbs the accused, his conscience condemns him, his thoughts reproach him, and he may not flee away, whence the blessed Augustine, Oh! how far too great are my sins; wherefore, when one has God as a rightful Judge, and one's own conscience as a witness, one has nothing to fear but one's own cause.

Cap. III.

1. De principali tractatu; et primo, quid sit lex.

Videndum est etiam quid sit lex; et sciendum, quod lex est commune præceptum virorum prudentum consultum, delictorumque quæ sponte vel ignorantia contrahuntur coertio, rei publicæ sponsio communis. Item author justitiæ est Deus, secundum quod justitia est in Creatore. Et secundum hoc, jus et lex idem significat; et licet largissime dicatur lex omne quod legitur, tamen specialiter significat sanctionem justam, jubentem honesta, prohibentem contraria.

2. Quid est consuetudo. Inst. I. . § 9.

Consuetudo vero quandoque pro lege observatur in partibus, ubi fuerit more utentium approbata, et vicem legis obtinet, longævi enim temporis usus et consuetudinis non est vilis authoritas.

f. 2 b.

Cap. IV.

1. De justitia et jure.

Quia a justitia (quasi a quodam fonte) omnia jura emanant, et quod vult justitia, idem jus prosequitur; videamus ergo quid sit justitia, et unde dicatur; item quid sit jus, et unde dicatur, et quæ sunt ejus præcepta; item quid sit lex, et quid consuetudo, sine quibus non poterit quis esse justus, ut faciat justitiam et justum judicium inter virum et virum.

2. Quid sit justitia. Inst. I. i. Dig. I. i. § 10.

Est autem justitia constans et perpetua voluntas jus suum cuique tribuens, cujus definitio poterit intelligi duobus modis, uno modo prout est in Creatore, altero prout est in creatura. Et si intelligatur prout est in Creatore, id est in Deo, plana sunt omnia, cum justitia sit Dei dispositio, quæ in omnibus rebus recte constituit

Chapter III.

We must see now what is law; and it is to be known that law is the common precept of prudent men in council, the coercion of offences, which are committed either voluntarily or through ignorance, and the common warrant of the body politic. Also God is the author of justice, for justice is in the Creator, and accordingly right and law have the same signification, and although in the widest sense of the term, everything which may be read is law, nevertheless, in the special sense, it signifies a rightful warrant, enjoining what is honest, forbidding the contrary. 1. Of the principal treatise; and first, what is law.

Custom, also, is sometimes observed for law in parts, where it has been approved by habitual usage, and it fills the place of law, for the authority of long usage and custom is not slight. 2. What is custom.

Chapter IV. f. 2 b.

Since all rights arise out of justice, as out of a fountain, and what justice wills, right promotes the same; let us see, then, what is justice, and whence it is so termed; likewise, what is right, and whence it is so termed, and what are its precepts; likewise, what is law, and what is custom, without which a person cannot be just, so as to execute justice and a just judgment between man and man. 1. Of justice and right.

Justice, then, is a constant and perpetual will to award to each his right, the definition of which may be understood in two manners; in one manner as it is in the Creator, in another as it is the creature. And if it be understood as it is in the Creator, that is in God, all things are plain, since justice is the disposal of God, which orders rightly and disposes rightfully in all things. 2. What is justice.

et juste disponit. Ipse enim Deus tribuit unicuique secundum opera sua. Ipse non est variabilis nec temporalis in dispositionibus et voluntatibus suis : Imo ejus voluntas est constans et perpetua : Ipse enim non habuit principium, nec habet, nec habebit finem. Altero modo intelligitur prout est in creatura, id est in homine justo. Homo enim justus habet voluntatem tribuendi unicuique jus suum, et ita illa voluntas dicitur justitia, et dicitur voluntas tribuere jus suum, non quantum ad actum, sed quantum ad affectionem : Sicut dicitur Imperator Augustus, non quod semper augeat imperium, sed quod ejus propositum est ut augeat. Sic ut dicitur de matrimonio, quod sit individua conjunctio, quia ejus sunt animi ut nunquam dividantur, dividuntur tamen postmodum ex causa. Item dicitur justitia constans, secundum definitionem, prout justitia est in creatura, ut per hoc quod dicitur " voluntas " intelligatur mens, et per hoc quod dicitur " constans " intelligatur bonum. Constantia enim semper accipitur in bonum, unde et sancti dicuntur fuisse constantes, ubi dicitur, O constantia martyrum ! Item, " Constantes " estote," constantia enim non admittit variationem. Per hoc autem quod dicitur " perpetua " intelligitur habitus, quia justitia est habitus mentis bonus, vel mentis bene constitutæ. Vel, justitia est voluntarium bonum, nec enim potest dici bonum proprie nisi intercedente voluntate, tolle enim voluntatem, et erit omnis actus indifferens, affectio quidem tua nomen imponit operi tuo. Item crimen non contrahitur, nisi voluntas nocendi intercedat. Item voluntas et propositum distinguunt maleficia. De hoc autem quod dicit " jus suum," id intelligitur hominis meritum, nam propter delictum, vel pactum non servatum, vel similia, privatur quis jure suo. De hoc autem quod dicit " cuique," id est sibi ipsi, ut honeste vivat ; item Deo, ut Deum diligat ; item proximo, ut eum non lædat. De hoc autem quod

For God himself awards to each according to his works. He himself is not variable, nor temporary in his disposition and will. His will is rather constant and perpetual, for he himself had no beginning, nor has, nor will have any end. It is understood in another manner according as it is in the creature, that is, in a just man. For a just man has the will of awarding to each his right, and so his will is termed justice, and it is said to be the will to award to each his right, not as regards the result, but as regards the intention; as an emperor is called August, not that he always augments his empire, but that he designs to augment it. As it is said of matrimony, that it is an inseparable union, for the parties are of a mind never to be separated, they are, however, separated afterwards when cause arises. Likewise, justice is termed constant, according to the definition, when justice is in the creature, that by the word "will" intention may be understood, and by the word "constant" good may be understood. For constancy is always taken in a good sense. Whence also the saints are termed constant, when it is said, Oh! the constancy of the martyrs." Likewise, "be ye constant," for constancy does not admit of variableness. By the phrase "per-"petual" also is meant a habit, for justice is a good habit of mind, or the habit of a mind well constituted; or justice is a voluntary good, for it cannot be called good properly, unless the will intervenes, for take away the will, and every act will be indifferent; your agency, however, imposes a name upon your work. So a crime is not committed, unless the will to do harm intervenes. So the will and the purpose distinguish bad acts. But as regards the words "his right," the merit of a man is thereby intended, for a person is deprived of his right by means of an offence, or a breach of contract, or the like; but as regards the words "to each" that is, to himself, that he may live honestly; likewise to God, that he may love God; likewise to his neighbour, that he may not harm him; but as regards the words "his right," that is, of

dicit "jus suum," id est justitiæ, et sic dicitur jus, justitia; quia in ea stant omnia jura.

3. Quid sit jus, et quod jus varias habet acceptiones.

f. 3.

Dig. I. i. § 1.

Azo. Inst., p. 1047.

Jus autem derivatur a justitia, et habet varias significationes. Ponitur enim quandoque pro ipsa arte, vel pro eo quod scriptum habemus de jure, quia jus dicitur ars boni et æqui, cujus merito quis nos sacerdotes appellat; justitiam namque colimus, et sacra jura ministramus. Item jus quandoque ponitur pro jure naturali, quod semper bonum et æquum est; quandoque pro jure civili tantum, quandoque pro jure prætorio tantum, quandoque pro eo tantum quod competit ex sententia. Prætor enim jus dicitur reddere, etiam

ib. § 11.

cum inique decernit, relatione facta, non ad id quod prætor fecit, sed ad illud quod prætor facere debuit. Item ponitur jus quandoque pro loco in quo redditur jus, ponitur etiam pro necessitudine, sicut pro jure cognationis vel affinitatis. Supponitur etiam jus quandoque pro actione, quandoque pro obligatione qualibet, quandoque pro hæreditate, sicut pro proprietate rei, quandoque pro bonorum possessione, quia est jus proprietatis,[1] et jus possessionis. Item jus possessionis, sicut feodum; unde locum habet assisa mortis antecessoris. Item jus possessionis, sicut liberum tenementum, si quis tenuerit tantum ad vitam quacumque ratione. Item jus proprietatis, quod dicitur jus merum, et unde poterit quis habere utrumque. Et dividi poterit quandoque jus proprietatis a jure possessionis, quia proprietas statim post mortem antecessoris descendit hæredi propinquiori, minori et majori, masculo et fœminæ, furioso et stulto, sicut fatuo, surdo et muto, præsenti et absenti, et ignoranti sicut scienti. Sed tamen non statim acquiritur talibus possessio; licet possessio et jus possessionis semper sequi debeat proprietatem. Jus autem possessionis descendere poterit per se ad alias

[1] "quia est jus proprietatis," and the subsequent words, down to "quandoque in possessione," are omitted in MSS. Crewe, Gl., and Gal. The printed text agrees with MS. Rawl.

justice, and right is thus called justice, because all right is included in justice.

3. What is right; and that right has various acceptations. f. 3.

Right, likewise, is derived from justice, and it has various significations. For it is sometimes used for the science itself, or for that which we have in writing concerning right, for right is termed the science of what is good and fair, through the merit of which we are sometimes called priests, for we worship righteousness and administer sacred rights. Likewise, right is sometimes used for natural right, which is always good and fair; sometimes for civil right only, sometimes for prætorian right only, sometimes for that only which results from a sentence. For the prætor is said to award right, even when he decides unfairly, with reference not so much to what he has done, as to what he ought to have done. Likewise, right is sometimes used to signify the place, where right is awarded; it is also used to signify family connection, for instance, for the right of relationship by blood or of affinity. Right is sometimes used for an action at law, sometimes for an obligation, sometimes for an inheritance, sometimes for the ownership of a thing, sometimes for the possession of goods, because there is a right of ownership and a right of possession. Likewise, there is a right of possession, as a feud, whence the assise of the death of an ancestor was introduced; likewise the right of possession, as in a case of freehold, if a person held it only for life in any way. Also the right of property, which is called absolute right, and whence a person may have both. And sometimes the right of property may be divided from the right of possession, for property immediately upon the death of the ancestor descends to the next heir, whether he be a minor or of full age, a male or a female, a madman or a fool, as, for instance, an idiot, a deaf person, or a dumb person, present or absent, ignorant equally as knowing of it; but possession is not always immediately acquired by such persons, although possession and the right of possession ought always to follow ownership. For the right of possession may

personas, et per alios gradus, ut si, cum jus proprietatis descendit ad agnatum propinquiorem, primo natus frater ponat se in seysinam, et sic moriatur seysitus, transvertit ad hæredes suos quoddam jus proprietatis cum jure possessionis, quod sequi debet proprietatem primam, et sic de hærede in hæredem; sed primi hæredes majus jus habent quam secundi hæredes, sed semper præferri debet possessio, donec primi hæredes verificaverint jus suum; si tamen frater postnatus plures habuerit filios, et primo natus se ponat in seysinam, ita fieri debet de eo ut supra, et sic poterit ad plures diversos hæredes descendere jus proprietatis in infinitum, ut cum plures jus habeant proprietatis, unus vel plures possunt habere jus majus. Item ponitur jus quandoque pro potestate, ut cum dicitur, "iste est sui juris," quandoque pro rigore juris, ut cum dividitur inter jus et æquitatem. Item ponitur pro ipsa arte, non pro quolibet jure quod invenitur in ipsa arte, nec enim omne jus præcipit, imo quoddam permittit, vel ponitur pro omni jure quod præcipit honeste vivere, alterum non lædere, jus suum cuique tribuere.[1]

4. Quid sit jurisprudentia. Inst. I. i. § 1. Azo, p. 1048.

Juris prudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.

5. Quid sit æquitas. Azo, in Inst. I., p. 1048.

Æquitas autem est rerum convenientia, quæ in paribus causis paria desiderat jura, et omnia bene coæquiparat; et dicitur æquitas quasi æqualitas, et vertitur in rebus, id est in dictis et factis hominum.[2] Justitia in mentibus justorum quiescit; inde est, quod si velimus loqui proprie, dicemus judicium æquum, non justum, et hominem justum, non æquum. Abutentes tamen iis appellationibus, dicimus hominem æquum, et judicium justum. Differt ergo multum juris prudentia a justitia;

f. 3 b.

[1] Gl. inserts after "tribuere" all which it has previously omitted.

[2] "Æquitas autem est rerum convenientia, quæ in paribus causis paria jura desiderat, et omnia bona æquiparat. Et dicitur æquitas quasi æqualitas, vertiturque in rebus, id est, in dictis et factis hominum." Azo.

descend of itself to other persons and by other degrees, as, for instance, when the right of ownership descends to the nearest collateral blood relation, the eldest born brother obtains seisin and dies seized of the property, a certain right of ownership with a right of possession, which ought to follow the first ownership, passes over to his heirs, and so from heir to heir; but the first heirs have more right than the second heirs, but the possession ought always to be preferred, until the first heirs have verified their right; if, however, a younger brother has several sons, and the eldest born obtains seisin, he ought to fare as above stated, and so the right of ownership may descend to several different heirs without end, so that when several have the right of ownership, one or several may have the greater right. Likewise, right is sometimes used to signify power, as when it is said, he is in his own right, and sometimes for the rigor of right, as when a distinction is made between right and equity. Sometimes it is used for the science itself, not for any right which may be found in the science itself, for right does not always enjoin, on the contrary, it sometimes permits; or it is used for all right, which teaches to live honestly, not to harm your neighbour, to award to each his own.

4. What is jurisprudence.

Jurisprudence is the knowledge of divine and human things, the science of what is just and unjust.

5. What is equity

Equity is the suitable adjustment of things, which in like causes seeks to administer like rights, and adjusts all things well on an equal platform, and it is termed equity, as being as it were equality, and it is employed in things, that is, in the sayings and actions of men. Justice reposes in the mind of the just; hence it is, if we would speak properly, we shall call a judgment equitable, not righteous, and a man righteous, not equitable. Misusing, however, these terms, we speak of an equitable man and a righteous judgment. Jurisprudence, therefore, f. 3 b.

juris enim prudentia agnoscit, et justitia tribuit cuique quod suum est. Item justitia virtus est, juris prudentia scientia est. Item justitia quoddam summum bonum est, juris prudentia medium.

6. Quæ sunt juris præcepta. Inst. I. i. § 3. Azo, in Inst., p. 1048.

Juris præcepta sunt tria hæc, honeste vivere, alterum non lædere, jus suum unicuique tribuere.

Cap. V.

1. Qualiter dividitur jus. Azo, *ib.*

Infinitæ vero sunt juris spécies, quia infiniti sunt homines et infinitæ sunt res. Nam sic[1] diceretur jus, aliud equinum, aliud asininum, aliud vineæ, aliud agri, aliud pecoris, aliud hominis.

2. Quid sit jus publicum. Azo, *ib.*

Est autem jus publicum quod ad statum reipublicæ pertinet, et consistit in sacris, in sacerdotibus, et in magistratibus. Interest enim reipublicæ ut habeat ecclesias, in quibus homines veniam petant peccatorum suorum. Expedit enim esse sacerdotes, a quibus de peccatis nostris pœnitentiam accipiamus, et qui orent pro nobis, et Dei adjutorium nobis adquirant et providentiam. Expedit etiam magistratus reipublicæ constitui, quia per eos, qui juredicendo[2] præsunt, effectus rei accipitur. Parum est enim jus in civitate esse, nisi sint, qui possunt jura gerere.

3. Quid sit jus pridatum. Dig. I. i. § 2.

Jus autem privatum est, quod ad singulorum pertinet utilitatem principaliter, et secundario pertinet ad rempublicam, unde dicitur, expedit quidem reipublicæ, ne quis re sua male utatur, et sic vice versa, quod reipublicæ principaliter interest, quod sic secundario respiciat utilitatem singulorum. Est etiam hujusmodi jus privatum tripartite collectum, aut ex naturalibus præceptis, aut gen-

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[1] "*et sic*" is the reading of MS. Rawl.

[2] "*juri dicendo*," Rawl.

differs much from justice, for jurisprudence acknowledges, and justice awards to each, what is his own. Likewise, justice is a virtue, jurisprudence is a science. Likewise, justice is one of the highest goods, jurisprudence is a good of an intermediate character.

The precepts of right are these three: to live honestly, to do no harm to another, to award to each his right. 6. What are the precepts of right.

Chapter V.

There are infinite species of right, because men are infinite and things are infinite. For if we were to give names to right, there would be one right as regards horses, another as regards asses, another as regards vines, another as regards fields, another as regards cattle, another as regards man. 1. In what manner right is divided.

Public right is what regards the state of the body politic, and it consists in sacred things, in sacred persons, and in magistrates; for it is in the interest of the State that it should have churches, in which men should petition for pardon for their sins; for it is expedient that there should be priests, from whom we may receive penance for our sins, and who may pray for us, and obtain for us the aid of God and his providence. But it is expedient that there should be constituted magistrates of the State, for the effect of right is obtained through those who are appointed to administer it, for it would be useless to have right in a state, unless there are persons competent to administer it. 2. What is public right.

Private right is that, which pertains principally to the interests of individuals, and which pertains in a secondary manner to the State, whence it is said that it is expedient for the State that no one should misuse his substance, and so reciprocally, that it interests the State principally, that it should in a secondary manner regard the interest of individuals. But this kind of private right is collected from three sources, either from natural precepts, or from 3. What is private right.

tium, aut civilibus. Dictum est supra de jure publico et privato, nunc autem dicendum quid sit jus naturale, vel gentium vel civile, quod dici poterit consuetudo quandoque :[1] Quomodo [2] et cui, et quando per consuetudinem vel per constitutionem principis derogetur legi,[3] in sequentibus dicendum est.

4. Quid sit jus naturale. Dig. I. i. § 3. Azo, in Inst., p. 1049.

Jus autem naturale pluribus modis dicitur. Primus modus est, ut dicatur a natura animati motus quidam institutus proveniens, quo singula animalia ad aliquid faciendum inducuntur, et unde dicitur sic. Jus naturale est, quod natura, id est ipse Deus, docuit omnia animalia, et ita est istud nomen "quod" accusativi casus, et hoc nomen "natura" erit nominativi casus, vel dici poterit quod nomen illud "quod" sit nominativi casus, ut dicatur sic, videlicet: Jus naturale, quod docuit omnia animalia natura, id est per instinctum naturæ, et ita hoc nomen "natura" erit casus ablativi, et hoc est quod dicitur, primi motus non sunt in nostra potestate, secundi vero sunt, et ideo si res procedat in delectationem et oblectamentum tantum et non ulterius, veniale tantum contrahitur peccatum; si autem ulterius progrediatur ad aliquid componendum, ut exerceat quis, quod turpiter cogitavit, tunc dicetur tertius motus et mortale contrahere peccatum. Est et illud notandum, quod
f. 4. qua ratione justitia est voluntas, habito respectu ad rationabilia tantum, eadem ratione dicitur jus naturale motus, habito respectu ad omnem creaturam rationabilem vel irrationabilem. Sunt tamen quidam, qui dicunt
Azo, in Inst., p. 1050. quod neque voluntas neque motus jus naturale vel gen-

[1] "*quandoque*," omitted in MS. Rawl.
[2] "*quibus*," Rawl.
[3] "*legi*" omitted, Gl., Rawl.

the precepts of nations, or from the precepts of citizens. We have spoken above concerning public right and private right; now, then, we must discuss what is natural right, or the right of nations, or the right of citizens, which may be called a custom sometimes. In what manner, for whom, or when a custom or a constitution of a prince may prevail in derogation of a law, will be discussed hereafter.

4. What is natural right.

The term natural right is used in several ways. The first way is when it is used to denote a certain regulated impulse arising from the nature of the living thing, whereby each animal is induced to do something, and whence it is thus defined: Natural right is that which nature, that is God himself,[1] has taught all animals, and thus the word "which" is in the accusative case, and the word "nature" is in the nominative case; or it might have been so said, that the word "which" should be in the nominative case, that it should be defined thus: Natural right is that, which has taught all animals by nature, that is by the instinct of nature, and so this word "nature" would be in the ablative case, and this is what is meant when it is said, our first impulses are not under our own control, but our second impulses are; and therefore, if the matter proceeds only as far as delight and pleasure only, and no further, a venial sin only is committed; but if one proceeds further to compose anything in order to put in practice what one has foully thought of, then a third impulse may be predicted, and mortal sin will be contracted. This also is to be noted, that in the way in which righteousness is a will with regard only to reasonable beings, in the same way natural right is said to be an impulse with regard to every creature, rational or irrational. There are some, however, who say that neither natural right, nor the right of nations can be called a will

f. 4.

[1] "God himself." These are Azo's words, and Bracton follows Azo's text very closely.

tium dici possunt, quia facti sunt, voluntas tamen vel motus[1] sunt instrumenta, per quæ jus naturale vel justitia apperiunt vel ostendunt suum effectum. In anima enim sunt virtutes et jura, et illud forte apertius dicitur. Jus autem naturale secundo modo dicitur debitum quoddam, quod natura cuilibet repræsentat. Item dicitur jus naturale jus æquissimum, cum dicitur lapsos minores secundum æquitatem restitui.

5. Quid sit jus civile. Inst. I. ii. § 1. Azo, *ib.*, p. 1050.

Jus autem civile, quod dici poterit jus consuetudinarium, pluribus modis ponitur, uno modo pro statuto cujuslibet civitatis; alio modo dicitur jus civile, id quod non est prætorium, et quandoque detrahit vel addit juri naturali vel gentium. Quæritur aliud jus quandoque in civitatibus ex consuetudine more utentium approbata, quam extra; tamen observari debeat talis consuetudo pro lege. Item appellari potest jus civile omne jus, quo utitur civitas, sive sit naturale, sive sit civile, sive gentium et hujusmodi.

6. Quid sit jus gentium.

Jus autem gentium est quo gentes humanæ utuntur, et quod a naturali jure procedit, eo quod jus naturale omnibus animalibus commune sit, quæ in terra, quæ in mari nascuntur, et quæ in aere.

7. Quæ descendunt et introducta sunt ex jure gentium. Inst. I. ii. § 2. Azo, *ib.*, p. 1050.

A jure enim gentium descendit maris et fœminæ conjunctio, et fit per mutuam utriusque voluntatem, quæ matrimonium appellatur; corporalis tamen conjunctio facta est, nec proprie dici poterit jus, cum ipsum sit corporale et videatur. Jura autem omnia sunt incorporalia et videri non possunt, quæ descendunt et introducta sunt ex jure gentium, ab eo tamen jure descendit liberorum procreatio et educatio, id est nutrimentum. Hoc autem jus gentium solum hominibus commune est, veluti erga Deum religio, ut parentibus

[1] "Jus naturale vel gentium dici "possunt, quia facti sunt, voluntas "tamen vel motus," omitted Gl. The printed text agrees with Crewe, Gal., and Rawl., except that Rawl. has "facta."

or an impulse, because they are facts, but a will or an impulse are instruments, by which natural right or righteousness disclose or manifest their effect. For in the soul there are virtues and rights, and that is perhaps said more openly. But natural right in a second manner is used to express a certain debt which nature represents for each person. Also, the term natural right denotes an equitable right, when it is said that the young who have erred are restored through equity.

5. What is civil right.

Likewise, civil right, which may be called customary right, is a term applied in one manner to the statute right of each city; in another manner to all which is not prætorian right, and sometimes it detracts from and sometimes it adds to natural right, or to the right of nations. Another right is sometimes acquired in cities approved by the custom of those, who use it, than without; nevertheless, such custom ought to be observed as law. Likewise, civil right is a term applied to every [kind of] right which a city observes, whether it be natural, or whether it be civil, or a right of nations, and such like.

6. What is the right of nations.

Likewise, the right of nations is what all nations observe, and which proceeds from natural right, inasmuch as natural right is common to all animals, which are born on the earth, or in the sea, or in the air.

7. What things are derived from, and are introduced by, the right of nations.

For the union of the male and the female is derived from the right of nations, and is effected by the mutual will of each, which is called matrimony; it is, however, a corporeal union, and cannot be properly called a right, since it is corporeal and visible. But all rights, which are derived from and are introduced by the right of nations, are incorporeal and invisible, but from that right there is derived the procreation and education, that is the nurture of children. But this right of nations is common to men alone, as [for instance] religion towards God, that

et patriæ pareamus, ut vim atque injuriam propulsemus, nam de jure hoc evenit, ut quod quis ob sui tutelam corporis fecerit, jure fecisse existimetur. Item cum inter homines cognationem quandam constituit natura, consequens est hominem homini insidiari nephas esse.

8. Quid sit manumissio. Dig. I. i. § 4. Azo, *ib.*, p. 1050.

Manumissiones autem juris gentium sunt. Est autem manumissio datio libertatis, id est detectio secundum quosdam, quia libertas, quæ est de jure naturali, per jus gentium auferri non potuit, licet per jus gentium fuit obfuscata. Jura enim naturalia sunt immutabilia. Sed dicitur vere quod libertatem dat, qui manumittit, licet non suam sed alienam, dat enim quod non habet, sicut videtur in creditore, qui usum fructum constituit in re non sua. Jura enim naturalia dicuntur immutabilia, quia non possunt ex toto abrogari vel auferri, poterit tamen eis derogari vel detrahi in specie vel in parte. Item ex hoc jure gentium introducta sunt bella, cum ad tutionem [1] patriæ inducuntur a principe, vel propulsantur violentiæ. Ex hoc etiam jure gentium discretæ, id est separatæ vel divisæ sunt gentes, regna condita et dominia distincta. Et non sunt dominia de novo inventa de jure gentium, sed ab antiquo, quia in Veteri Testamento aliquid erat meum et aliquid tuum, et unde tunc erat prohibitum ne fieret furtum, et etiam tunc præceptum fuit, ne quis mercenarii sui retineret mercedem. Ex hoc etiam jure gentium, agris sunt termini positi, ædificia sunt collata et vicinata, ex qua collatione

Azo, in Inst., p. 1051.

f. 4 b. Dig. I. i. § 5.

[1] "*tuitionem*" is the reading of MS. Rawl., so likewise "inducun-" tur," but Azo, p. 1051, has "cum "indicuntur a principe."

we should obey our parents and our country, that we should ward off violence and injury, for it results from this right, that whatever a person does for the protection of his own person, he is thought to have done rightfully. Likewise, since nature has established a certain relationship between men, it follows that for man to plot against man is wicked.

8. What is manumission.

Manumissions, likewise, belong to the right of nations. But a manumission is the giving of liberty, that is, the declaration of it, according to some, for liberty, which is [enjoyed] of natural right, cannot be taken away by the right of nations, although it has been obscured by the right of nations; for natural rights are immutable. But it is truly said, that he, who manumits, gives liberty, but it is not his own, but another's liberty, for he gives that which he has not, as is apparent in [the case of] a creditor, who has the usufruct of a thing which is not his own; for natural rights are said to be immutable, for they cannot be totally abrogated or taken away, but they may undergo derogation or diminution in specie or in part. Likewise, by this right of nations wars have been introduced, when they are brought on by princes to defend their country, or when violence is to be warded off. By this right of nations, also, nations are distinguished, that is, separated, or divided, kingdoms founded, and dominions distinguished. And dominions are not a new invention under the right of nations, but [have existed] of ancient time, for under the Old Testament[1] something was mine and something was thine, and thence it was prohibited to commit a theft, and even then it was enjoined, that no one should retain the wages of his hired [servant]. By this right of nations boundaries were set to fields, buildings were collected together in the neighbourhood of one another, from which aggrega- f. 4 b.

[1] Azo, in a similar manner, appeals to the Old Testament, as sanctioning rights of "meum" and "tuum."

fiunt civitates, burgi et villæ, et generaliter jus gentium se habet ad omnes contractus, et ad alia plura. Quæ autem sit longa consuetudo, dicetur infra.

Cap. VI.

1. De prima divisione personarum. Inst. I. ii. § 12. Azo, *ib.*, p. 1051.

Dictum est supra de jure naturali, gentium et civili, sed quia omne jus, de quo tractare proposuimus, pertinet vel ad personas, vel ad res, vel ad actiones secundum leges et consuetudines Anglicanas, et cum digniores sint personæ, quarum causa statuta sunt omnia jura; ideo de personis primo videamus et earum statu, qui varius est et diversus, et postmodum de jure personarum, quod vertitur circa eas. Est autem prima

Inst. I. iii. Azo, p. 1051.

divisio personarum hæc et brevissima, quod omnes homines aut liberi sunt, aut servi,[1] id est omnis homo aut est liber, aut est servus, ut ita resolvatur pluralis omnino in singularem, sed sic opponi poterit de ascripticio (ut dicitur), quia vere liber est, licet quodam servitio sit astrictus, et de eo brevis poterit esse solutio, quia ei, qui liber est, villenagium vel servitium nihil detrahit libertatis, habita tamen distinctione, utrum tales sint villani et tenuerint in villano socagio de dominico domini regis, de quibus inferius tractabitur plenius. Item nec obstat, quod dicitur de statu libertatis, quia quamvis servus fuerit in possessione libertatis, revera servus est, quamvis se et sua aliquando defendere possit contra dominum suum, petentem ipsum ut nativum suum, per exceptionem privilegii. Cum autem omnis homo sit liber aut servus, expedit videre quid sit libertas, et quid servitus, et qualiter contingat servitus.

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[1] *servus*. The translation "serf" is open to some objection, but it is, in the Editor's opinion, less objectionable as a generic term than "villein," which Britton uses.

tion cities, boroughs, and vills have been formed, and, in general words, the right of nations applies to all contracts, and to many other things. But what is long custom, will be explained hereafter.

Chapter VI.

1. On the first division of persons.

We have spoken above about natural right, the right of nations, and civil right, but since all right, respecting which it our purpose to treat, appertains either to persons, or to things, or to actions, according to the laws and customs of England, and since persons are of the greater dignity, as for their sake all rights have been established, let us accordingly treat first of persons and their condition, which is various and diverse, and afterwards of the right of persons, which is concerned with them. But the first and shortest division of persons is this, that all men are either free or serfs, that is, every man is either a free man or is a serf, if the plural number be resolved into the singular; but to this an objection may be raised respecting a bondsman (as he is called), because he is truly free, although bound to a certain service, and in respect of him the answer is simple, because villenage or serfage detracts nothing from the liberty of him who is free, the distinction always being obscured, whether such persons are villeins and have held in villein socage of the domain of the lord the king, respecting whom we shall treat more fully below. Likewise, there is no difficulty in what has been said of the condition of liberty, for although a serf may be in the possession of liberty, he is in truth a serf; although he may sometimes defend himself and his goods against his lord, who claims him as his natural born [serf] under the exception of a privilege. But since every man is either a free man or a serf, it is expedient to consider what is liberty and what is servitude.

2. Quid sit libertas. Inst. I. iii. § 1. Azo, p. 1052.

Est autem libertas naturalis facultas ejus, quod cuique facere libet, nisi quod jure aut vi prohibetur. Sed secundum hoc videtur quod servi sint liberi, nam et ipsi liberam habent facultatem, nisi vi aut jure prohibeantur. Sed definitur libertas eo jure, quo prodita est, ex qua liberi vocantur, licet enim servi efficiantur liberi, tamen quoad jus gentium servi sunt, quoad jus vero naturale liberi, et ita liberi et servi, diversis tamen respectibus, et sic omnino liber et omnino servus et non pro parte, et secundum quod prædictum est. Et in hac parte jus civile vel gentium detrahit juri naturali.

3. Quid sit servitus. Inst. I. iii. §§ 2 and 3. Britton, i. ch. xxxii. Fleta, 1, 2.

Est quidem servitus constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur, et dicitur a servando, non a serviendo. Antiquitus enim solent principes captivos vendere, et ideo eos servare et non occidere. Dici etiam poterunt mancipia eo, quod ab hostibus manucapiuntur ; et ideo cum postmodum libertati donantur, dicuntur manumissi, quasi a manu dimissi. Sed tamen omnis servus non dicitur a servando, sed a serviendo, non enim omnis qui servit est servus, nec dicitur a servando, sicut videri poterit in tabellione. Tabellio enim qui dicitur, servus publicus a serviendo derivatur.

4. Qualiter nascuntur servi et qualiter fiunt. Inst. I. iii. § 4. f. 5.

Servi autem aut nascuntur aut fiunt. Nascuntur autem ex nativo et nativa[1] alicujus copulatis vel solutis, sive sub potestate domini constituti sunt, sive extra potestatem. Item nascitur servus, qui ex nativa soluta generatur quamvis ex patre libero, quia sequitur conditionem matris quasi vulgo conceptus. Item dicitur

[1] *nativo et nativa*, naifs and niefs, so called, when of ancient servile lineage.

2. What is liberty.

Liberty is the natural faculty of doing what each person pleases, except what is prohibited by right or by force. But according to this it seems that serfs are free, for they have a free faculty, except where they are prohibited by force or by right. But liberty is defined by that right, by which it has been handed down, whence men are called free men; for although serfs may be made free, nevertheless they are serfs under the right of nations, whilst they are free under the right of nature, and so they are both free and serfs, only in different respects, and so altogether free and altogether a serf, and not partially [one or the other], and according to what has been said above. And in this part civil right or the right of nations detracts from natural right.

3. What is surfage.

Servitude is an ordinance of the right of nations, under which a person is made subject to the dominion of another contrary to nature, and it is so termed from "preserving" and not from "serving." For of ancient times princes used to sell their captives, and therefore to preserve them, and not to kill them. They may also be called hand-captured, because they are "captured" by the hand of the enemy, and, therefore, when they are afterwards presented with their liberty, they are said to be "hand-freed," because they are let go from the hand. Nevertheless, some serfs are not so called from being "preserved," but from "serving"; but not every one who serves is a serf, nor is he so called from being preserved, as in the case of a town clerk, for a town clerk who is called a public serf, is so called from serving.

4. In what manner persons are born serfs, and in what manner they become serfs.

Serfs are either born or become such. They are born such [when born] from natural-born male and female serfs, married or single, whether they are remaining under the power of a lord or are beyond his power. Likewise, he is born a serf who is born of a natural-born female serf, unmarried, by a free father, for what is conceived at large follows the condition of the mother. Also, he is

servus natione de libero genitus, qui se copulavit villanæ in villenagio constitutæ, sive copula maritalis intervenerit sive non. Item vice versa, si villanus ingrediatur ad liberam in liberum tenementum, partus proveniens erit servus. Si autem ex nativo unius et ex nativa alterius, tunc refert in cujus villenagio, ut per hoc videatur, cujus servus esse debeat, et quem debeat sequi partus, patrem videlicet, vel matrem, secundum quod copulati fuerint vel soluti, et secundum quod fuerint sub potestate dominorum vel extra. Item si a libero et nativa soluta, partus erit nativus, quia sequitur conditionem matris, si extra villenagium; si autem ex nativa et libero extra villenagium copulatis et in libero thoro, liber erit (ac si de libera et libero): et ita nascuntur servi. Fiunt etiam servi liberi homines captivitate, de jure gentium, ut prædictum est; bella enim orta sunt, et captivitates sequutæ, et cætera. Fit etiam liber homo servus per confessionem in curia regis factam; ut cum liber homo sit in curia regis, se cognoscat ad villanum. Item liber homo sit servus, si, cum semel manumissus fuerit, ob ingratitudinem in servitudinem revocetur. Item sit liber homo servus, cum ab initio clericus vel monachus factus fuerit, postea ad secularem vitam redierit, quia talis debet restitui domino suo. Item servorum una est conditio substantialis; quicunque enim servus est, ita est servus sicut alius, nec plus nec minus.

Britton, l. i. ch. xxxii.
Fleta, 1, 2.
Britton, l. i. ch. xxxii. § 2.
Fleta, 1.

5. Quis dici possit liber,

Liber vero et ingenuus dici poterit, qui statim, ut natus est, liber est; sive ex duobus liberis et ingenuis,

termed a serf by birth who is begotten of a free father, f. 5.
who has connection with a female villein remaining in villeinage, whether he has had such connection maritally or not. Also, reciprocally, if a villein has access to a free woman in a free tenement, the offspring resulting therefrom will be a serf. But if he be born of a natural-born male serf [of one lord], and of a natural-born female serf [of another lord], then it is of importance in whose villeinage [he is born], that through that circumstance it may be seen whose serf he ought to be, and whom the offspring ought to follow; the father, for instance, or the mother, according as they may be married or single, and according as they may be under the power of their [respective] lords, or beyond it. Likewise, if from a free man and a natural-born female serf, unmarried, the offspring will be a natural-born serf, because he follows the condition of the mother, if he is born within villeinage, but if he is born of a free father and a natural-born female serf, who have had connection out of villeinage and in a free bed, he will be free, as born of a free woman and a free man, and in this manner persons are born serfs. But free men become serfs by captivity, under the right of nations, as has been above said, for wars have arisen and captivities have followed, &c. Likewise, a free man becomes a serf by an acknowledgment made in the king's court, as when a free man is in the king's court, he acknowledges himself to be a villein. Likewise, a free man becomes a serf, if, when he has once been hand-freed, he is, for his ingratitude, reclaimed into servitude. Likewise, a free man becomes a serf, if, when he has been originally made a clerk or a monk, he has afterwards returned into secular life, for such a person ought to be restored to his lord. Likewise, the substance of the condition of serfs is uniform; for whoever is a serf, is a serf like another serf, neither more nor less.

5. Who may be called free, and

He may be called free and of good birth, who as soon as he is born is free, whether he is born of parents, who are both free and of good birth, or of two persons, who

et quis ingenuus. Inst. i. 4.

sive ex duobus libertinis, scilicet qui ex justa servitute manumissi sunt, sive ex uno ingenuo et altera libertina, sive nascatur ex matre ancilla et patre libero, dum tamen extra villenagium et in libero thoro, dum tamen ex matrimonio.[1] Item si ex matre libera et servo extra matrimonium. Et sufficit matrem esse liberam, vel tempore illo quo concepit, vel tempore quo parit, vel saltem in medio illorum temporum, licet ancilla facta fuerit, quia non debet calamitas matris ei nocere, qui in utero est.

6. Qui dicuntur libertini. Inst. I. 5. Dig. I. v. 3. § 6.

Sunt etiam liberi qui dicuntur libertini, illi scilicet qui ex ista[2] servitute manumissi sunt, et dicitur libertinus quasi liberatus a servitute.

7. Qui dici non possunt liberi, nec computantur inter liberos. Dig. I. 5. § 14. Britton, l. iii. ch. ii. § 19. Fleta, 2.

Item qui ex damnato coitu nascuntur inter liberos non computantur, sicut ex adulterio, et hujusmodi. Item qui contra formam humani generis converso more procreantur, veluti si mulier monstruosum vel prodigiosum sit enixa. Partus autem, qui membrorum officia ampliavit,[3] ut si sex digitos habeat, vel si quatuor tantum, vel si tantum unum, talis inter liberos connumerabitur.[4]

Cap. VII.

1. De secunda divisione personarum.

Est autem alia divisio hominum, quod alii sunt masculi, alii feminæ, alii hermaphroditi. Et differunt feminæ a masculis in multis, quia earum deterior est conditio, quam masculorum.

2. Cui comparari debet

Hermaphroditus comparatur masculo tantum, vel feminæ tantum, secundum prevalescentiam sexus inca-

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[1] "in matrimonio," Gal.

[2] "justa," Rawl.

[3] "Partus autem, cui natura mentorum officia ampliavit," MSS. Crewe, Gl., and Galeaczo.

[4] "inter liberos non connumerabitur," MS. Rawl.

have been made free, for instance, who have been hand-freed from rightful servitude, or of a father of good birth and a mother who has been made free, or of a mother who is a handmaïd and a free father, provided, however, it is out of villeinage and in a free bed, provided, however, it was under marriage. Likewise, if out of a free mother and a serf without marriage. And it is sufficient that the mother should be free, either at the time when she conceived, or at the time when she was delivered, or at least between those times, although she may have been a handmaid, for the misfortune of the mother ought not to harm the child, which is within her womb. who of good birth.

There are also free persons, who are called freedmen, those, for instance, who have been hand-freed from servitude, and are called freedmen as having been freed from servitude. 6. Who are called freedmen.

Likewise, those, who are born of a forbidden union, are not reckoned amongst the free, as, for instance, from an adulterous intercourse, and so forth. Likewise, those, who are procreated under an altered form unlike the human form, as, for instance, if a woman is delivered of a monster or a prodigy; but an offspring, if it has only an increased number of members, as, for instance, if it has six fingers, or if it should have only four, or if it should have only one, such an offspring shall be accounted in the number of free persons. 7. Who cannot be termed free, are reckoned amongst free persons.

Chapter VII.

There is also another division of human beings, that some are male, and others female, and others hermaphrodites. And females differ from males in many respects, because their condition is worse than that of males. 1. Of the second division of persons.

An hermaphrodite may be compared to a male only, or to a female only, according to the predominance of the 2. To what an hermaph-

hermaphroditus. Dig. I. 5. §§ 9, 10.

lescentis. Item qualiter servi efficiantur liberi per manumissionem, et quis possit manumittere et quis non, dicetur plenius infra de actionibus et servis fugitivis.

f. 5 b.

Cap. VIII.

1. De tertia divisione personarum.

Liberorum autem hominum quorumcunque nulla est acceptio apud Deum, nec etiam servorum, quia non est personarum acceptor Deus, quia quantum ad Dominum, qui major est fit tanquam minor, et qui præcessor fit tanquam ministrator. Apud homines vero est differentia personarum, quia hominum quidam sunt præcellentes et prelati, et aliis principantur. Dominus Papa, videlicet in rebus spiritualibus, quæ pertinent ad sacerdotium, et sub eo archiepiscopi, episcopi, et alii prælati inferiores.

2. De diversis nominibus dignitatum.

Item in temporalibus sunt imperatores, reges, et principes, in hiis quæ pertinent ad regnum, et sub eis duces, comites, barones, magnates sive vavasores, et milites: et etiam liberi, et villani, et diversæ potestates sub rege constitutæ. Comites videlicet quia a comitatu sive a societate nomen sumpserunt, qui etiam dici possunt consules a consulendo; reges enim tales sibi associant ad consulendum et regendum populum Dei, ordinantes eos in magno honore et potestate et nomine, quando accingunt eos gladiis, id est ringis gladiorum.

3. Quid sunt ringæ.

Ringæ enim dicuntur ex eo quod renes girant et circundant, et unde dicitur, accingere gladio tuo, &c.

sex that goes to heat. Likewise, in what manner serfs are made free by manumission, and who may manumit them and who not, will be explained more fully below [in speaking] of actions and fugitive slaves.

rodite may be compared.

Chapter VIII.

f. 5 b.

Before God there is no acceptance of men as free, nor of men as slaves, for God is not an acceptor of persons; for as regards the Lord, he who is greater becomes sometimes less, and he who precedes becomes, as it were, a servant. But there is a difference of persons before men, because some men are pre-excellent, and are preferred and take precedence of others. The Lord Pope, for instance, in spiritual matters, which pertain to the priesthood, and, under him, archbishops, bishops, and other prelates.

1. Of the third division of persons.

Likewise, in temporal matters, there are emperors, kings, and princes in those matters which pertain to the realm, and under them dukes,[1] counts, barons, magnates, or vavasours,[2] and knights; and also freemen and villeins, and different powers established under a king. Counts, for instance, because they have derived their name from companionship or association, who may also be called consuls, from consulting; for kings associate with themselves such persons for consultation and to govern the people of God, ordaining them in great honour and power and name, when they gird them with swords, that is, with sword-belts.

2. Of the different names of dignities.

For they are called belts from the circumstance that they gird and encircle the loins, and hence the phrase, to gird yourself with your sword. And belts

3. What are belts.

[1] Dukes are here mentioned, as as amongst foreign titles. They are omitted below in fol. 34, where the author speaks of the Curia Regis.

[2] *See note*, p. 39.

Et ringæ cingunt renes talium, ut custodiant se ab incestu luxuriæ, quia luxuriosi et incestuosi Deo sunt abhominabiles.

4. Quid significat gladius.

Gladius autem significat defensionem regni et patriæ. Sunt et alii potentes sub rege, qui dicuntur barones, hoc est robur belli. Sunt et alii qui dicuntur vavasores, viri magnæ dignitatis. Vavasor enim nihil melius dici poterit, quam vas sortitum ad valetudinem.[1]

5. De dignitate regis, et quod rex non habet parem.

Sunt et sub rege milites, scilicet ad militiam exercendam electi, ut cum rege et supradictis militent, et defendant patriam et populum Dei. Sunt etiam sub rege liberi homines, et servi ejus potestati subjecti, et omnis quidem sub eo, et ipse sub nullo, nisi tantum sub Deo. Parem autem non habet in regno suo, quia sic amitteret præceptum, cum par in parem non habeat imperium. Item nec multo fortius superiorem, nec potentiorem habere debet, quia sic esset inferior sibi subjectis, et inferiores pares esse non possunt potentioribus. Ipse autem rex, non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem. Attribuat igitur rex legi, quod lex attribuit ei, videlicet dominationem et potestatem, non est enim rex, ubi dominatur voluntas et non lex. Et quod sub lege esse debeat, cum sit Dei vicarius, evidenter apparet ad similitudinem Jesu Christi, cujus vices gerit in terris, quia verax Dei misericordia, cum ad reparandum humanum genus ineffabiliter ei multa suppeterent, hanc potissimam elegit viam, quasi ad destruendum opus

[1] "validitatem," MS. Crewe. The printed text agrees with Gl., Gal., and Rawl.

gird the loins of such persons, that they may guard themselves from the unchastity of wantonness, for the wanton and unchaste are abominable before God.

4. What the sword signifies.

Likewise, the sword signifies the defence of the realm and of the country. There are also other powerful persons under the king, who are called barons, that is the strength of war. There are also others, who are called vavasours,[1] men of great dignity; for a vavasour cannot be better defined, than as a vessel picked out for strength.

5. Of the dignity of the king, and that the king has no peer.

There are also under the king knights, that is, persons chosen to practice warfare, that they may make war in company with the king and those above mentioned, and may defend the country and the people of God. There are also under the king freemen and serfs subject to his power; and every person is under him, and he is under no person, but is only under God. He has no peer in his own kingdom, for so he would forfeit the precept, since equal has no power over equal; also, much less has he any superior or more powerful person than himself [in his kingdom], for so he would be inferior to his own subjects, and inferiors cannot be equal to their superiors. But the king himself ought not to be subject to man, but subject to God and to the law, for the law makes the king. Let the king, then, attribute to the law what the law attributes to him, namely dominion and power, for there is no king where the will and not the law has dominion; and that he ought to be under the law, since he is the vicar of God, appears evidently after the likeness of Jesus Christ, whose place he fills on earth; for the true mercy of God, when many things were at his command to restore the human race in an ineffable manner, chose this way in preference to all others, as if to destroy the work of the devil he should use not the

[1] Vavasours are described below, fol. 93 b., as inferior to barons, quia caput non habent, sicut baronia.

diaboli non virtute uteretur potentiæ, sed justitiæ ratione; et sic esse voluit sub lege, ut eos, qui sub lege erant, redimeret, noluit enim uti viribus, sed ratione et judicio. Sic et beata Dei genitrix, Virgo Maria, mater Domini, quæ singulari privilegio supra legem fuit, pro ostendendo tamen humilitatis exemplo legalibus subdi non refugit institutis. Sic ergo rex, ne potestas sua maneat infrenata, igitur non debet esse major eo in regno suo in exhibitione juris, minimus autem esse debet, vel quasi, in judicio suscipiendo, si petat. Si autem ab eo petatur (cum breve non currat contra ipsum) locus erit supplicationi, quod factum suum corf. 6. rigat et emendet, quod quidem si non fecerit, satis sufficit ei ad pœnam, quod Dominum expectet ultorem. Nemo quidem de factis suis præsumat disputare, multo fortius contra factum suum venire.

Cap. IX.

1. De quarta divisione personarum, quod est aut sui juris, aut alieni juris, aut dubii. Inst. I. 8. Dig. I. 5.

Dictum est supra de statu personarum, nunc supponenda est alia divisio, ut per divisiones facilior tradatur doctrina; partitio enim sive divisio animum legentis incitat, mentem intelligentiæ præparat, memoriam artificiose reformat. Est autem hæc divisio talis, quod omnis homo aut est sui juris, aut alieni, aut dubii, secundum quosdam, qui dicunt statum alicujus esse in suspenso, sicut de eo qui captus est ab hostibus, sed revera absurdum esset dicere aliquem eodem tempore nec in patris, nec in sua potestate fuisse, quod enim dicitur, pendente statu, verum est ratione futuræ fic-

vigor of his power, but the reason of his justice, and so he was willing to be under the law, that he might redeem those who were under the law, for he was not willing to use his strength, but his reason and judgment. So likewise the Blessed Virgin Mary, the parent of God, the mother of our Lord, who by a singular privilege was above the law, nevertheless, in order to show an example of humility, she did not refuse to be subject to the institutions of law. So therefore the king, that his power should not be unrestrained; but there ought not to be a greater than he is in his own kingdom in the administration of justice, but he ought to be the least, or, as if it were so, if he is a petitioner to obtain judgment. But if a petition is made to him (since a writ does not run against him), there will be place for a supplication to him to correct and amend his own act, which indeed if he omits to do, it is sufficient for his punishment that he await the vengeance of the Lord. Let no one presume to dispute [before him] respecting his acts, much less to contravene his acts. f. 6.

Chapter IX.

We have spoken above of the condition of persons, now another division is to be suggested, that teaching may be more easily effected by divisions [of the subject], for a partition or a division [of the subject] arouses the attention of the reader, prepares the mind to understand, artificially strengthens the memory. But this division is of this kind, that every person is independent, or dependent on another, or of doubtful condition according to some, who say that the condition of a person is in suspense, as in the case of a person who has been captured by an enemy; but it would be absurd to say that any one at that time was neither dependent on his father nor independent, for what is meant by the expression "his condition is in suspense" is true with regard to the

1. Of the fourth division of persons; that a person is either independent, or dependant on another, or of doubtful condition.

tionis postliminii, quod omnino separatur a jure. Si enim revertatur, fingitur non fuisse captus, sed inspecto præsenti statu nunquam pendet, cum lex dicat captum ab hostibus esse servum. Igitur possibile est quod filium habeat in potestate sua, et generaliter vera est, quod nulla præsentia, nulla præterita pendent.

2. Qui sunt sui juris.

Sui juris autem sunt omnes, qui non sunt in aliena potestate. Cognitis autem personis, quæ sunt alieni juris, per consequens sciri poterit omnes alios esse sui juris.

3. Qui sunt alieni juris. Inst. I. 8. § 2. Dig. I. 6. § 2.

In potestate aliena sunt servi, quæ quidem potestas dominorum in servos a jure gentium est, quæ aliquando fuit et vitæ et necis servorum, sed nunc coarctata est per jus civile, ita quod vita et membra sunt in potestate regis, ita quod si quis servum suum occiderit, non minus punietur, quam si alienum occiderit, et in hoc legem habent contra dominos, quod stare possunt in judicio contra eos de vita et membris propter sævitiam dominorum, vel propter intollerabilem injuriam, ut si eos destruant, quod salvum non possit eis esse waynagium suum. Hoc autem verum est de illis servis, qui tenent de antiquo dominico coronæ, sed de aliis secus est, quia quandocunque placuerit domino, auferre poterit a villano suo waynagium[1] suum et omnia bona sua. Expedit enim rei publicæ ne quis re sua male utatur. Est autem effectus hujus dominicæ potestatis, quod quicquid per servum juste acquiritur, id domino acquiritur vel quasi domino, sicut bonæ fidei possessori, vel usurario, vel fructuario. Qui igitur ex te et uxore tua

[1] The Latin equivalent of the Anglo-Norman "gaignage," the villein's implements of husbandry.

future fiction of "rehabilitation," which is altogether separated from right. For if he returns from captivity, the fiction is [allowed], that he has never been captured; but if his present state is regarded, his condition is never in suspense, for the law says that a person captured by the enemy is a serf. It is therefore possible that he may have a son dependent upon him, and it is generally true that no present things and no past things are in suspense.

2. What persons are independent.

But all persons are independent, who are not under the authority of another person. If it is made known therefore what persons are dependent on others, it will be known, as a consequence, that all others are independent.

3. What persons are dependent on others.

Serfs are under the authority of another, and the power of the master over his serfs is [derived] from the right of nations, which was once a power of life and death over serfs; now it is restricted by civil right, so that life and limb are under the protection of the king; so that if a person were to kill his serf, he would be no less punished, than if he had killed another person's serf; and serfs have in this respect [the protection of] law against their masters, that they may witness in court against them in [a matter of] life and limb on account of the cruelty of their masters, and on account of any intolerable injury, as if they should destroy them, so that they should not save their waynage. But this is true of those serfs, who hold of ancient demesne of the crown, but as regards others it is otherwise, because whenever it shall please their master, he may take away from his villein his waynage and all his goods. For it is expedient for the State that no one should misuse his substance. But the effect of this power of the master is, that, whatever is rightfully acquired by the serf, is acquired for his master or his substitute, as for a possessor in good faith either of the use or or the fruits of a thing. Whoever therefore is born of you and your wife is under

nascitur, in tua potestate est. Item qui ex filio tuo et ejus uxore nascitur, id est nepos tuus et neptis, æque in tua potestate sunt, et pronepos et proneptis, et deinceps cæteri ; qui vero ex filia tua nascitur, in potestate tua non est, sed in patris ejus, vel avi, vel proavi.

4. Qui sunt in potestate patrum.

In potestate autem patrum sunt filii, qui nascuntur ex justo et legittimo matrimonio. Idem in nepotibus et pronepotibus, quantum ad avos et proavos paternos. Et præsumitur quis esse filius hoc ipso, quod nascitur ex uxore, quia nuptiæ probant filium esse, et semper stabitur huic præsumptioni, donec probetur contrarium ; ut ecce, maritus probatur non concubuisse aliquamdiu cum uxore, infirmitate vel alia causa impeditus, vel erat in ea invaletudine, ut generare non possit, vel probatur quod fuit absens per decennium et reversus invenit anniculum, hic, qui in domo mariti natus est (licet vicinis scientibus), non erit filius mariti. Et de hac materia inveniri poterit plenius infra, de partu supposito.

Inst. I. 9. Dig. I. 6. §§ 4, 6. Britton, l. iii. ch. ii. § 17.

f. 6 b.

Cap. X.

1. Qualiter dissolvitur patria potestas et dominica.

Dictum est supra, quemadmodum dominica et patria potestas constituatur ; nunc autem dicendum, qualiter dissolvatur et tollatur, et sciendum, quod tribus modis in liberis personis, videlicet morte naturali, morte civili, et dignitate. Item in servis, dominica potestas tollitur manumissione et morte naturali. Ut, si pater, qui ha-

Inst. I. xii. § 1. *ib.* 2.

your authority. Likewise, he who is born of your son and his wife, that is your grandson or granddaughter, is equally under your authority; and your great-grandson and great-granddaughter, and the rest in succession; but the child which is born of your daughter is not under your authority, but under the authority of her husband's father, or grandfather, or great grandfather.

4. Who are under the father's authority.

Sons born of rightful and legitimate marriage are under the authority of their fathers. The same may be said of grandchildren and great-grandchildren, as regards their grandfathers and their great-grandfathers by the father's side. And a person is presumed to be a son from the very fact, that he is born of a wife, because marriage proves him to be a son, and this presumption will always hold good, until the contrary is proved; as, for example, the husband proves that he has not had connection with his wife for some time, from the impediment of illness or some other cause, or that he was in that state of ill health that he could not procreate a child, or it is proved that he has been absent for ten years, and on his return has found a child one year old; such a child, who has been born in the husband's house (although with the knowledge of the neighbours), will not be [held to be] the son of the husband. And on this subject more will be found hereafter, under the head of a supposititious offspring. f. 6 b.

Chapter X.

1. In what manner the father's authority and the lord's authority is abolished.

We have discussed above how the authority of the father and the lord is established; now we will discuss how it is dissolved and removed, and be it known that it is so in three ways, in [the case of] free persons; for example, by natural death, by civil death, or by [attaining] a dignity. Likewise, in the case of serfs, the authority of the lord is taken away by manumission, and by natural death. As [for instance], if a father,

Inst. I. xvi. § 6. bet filium in potestate, moriatur, nam ejus filii incipiunt esse sui juris, quamvis aliquando remaneant sub tutela dominorum et sub cura amicorum vel parentum. Mortuo vero avo patruo, nepotes ejus non sunt sui juris, sed recidunt in potestatem sui patris, si pater eorum vivat, cum avus moriatur, et nullo modo exierint de patris potestate per emancipationem vel alium modum, sicut per dignitatem. Item morte civili, ut si pater damnetur propter aliquam feloniam commissam, vel alius antecessor, vel perpetuo exuletur, si autem relegetur ad tempus, nihilominus retinebit liberos in potestate sua; quia sua, cum remeabit, habebit. Item dignitate aliquando, ut per episcopalem dignitatem. Item per emancipationem solvitur patria potestas; ut siquis filium suum forisfamiliaverit cum aliqua parte hæreditatis suæ, secundum quod antiquitus fieri solet. Item solvitur dominica potestas quandoque manumissione, ut si dominus servum suum manumiserit, quacunque ratione manumissionis, secundum quod inferius dicetur de manumissionibus.

2. De quadam subdivisione personarum, quæ sunt in potestate aliena. Inst. I. xiii.

Prima divisio personarum fuit talis, quod omnes homines aut liberi sunt aut servi, secunda, quod quædam personæ sunt sui juris, et quædam alieno juri subjectæ; nunc sequitur alia divisio, quod personarum, quæ non sunt in potestate aliena, quædam sunt in custodia seu tutela dominorum, quædam in curatione parentum et amicorum, secundum quod inferius dicetur plenius, de custodia et cura. Quædam vero neutro jure tenentur, sicut illi, qui sunt plenæ ætatis. Et quibus modis finitur cura et tutela, dicetur plenius infra. Item quædam sunt sub virga, ut uxores, et cætera.

who has a son under his authority dies, his sons begin to be independent, although they sometimes remain under the guardianship of lords and under the curatorship of friends or of relations. But on the death of a grandfather by the father's side, his grandchildren are not independent, but they fall back under the authority of their father, if their father is living, when their grandfather dies, and they have not been released from their father's authority by emancipation, or by any other means, as by attaining a dignity. Likewise, by civil death, as if the father has been condemned on account of the commission of a felony, or some other ancestor, or if exiled for ever; but if he be banished for a time [only], he will nevertheless retain his children under his authority, for he will have all that is his on his return. Also, by [attaining] a dignity, as, for instance, the episcopal dignity. The father's authority is likewise dissolved by emancipation, as for instance, if a father has let go out of his family his son with a certain portion of his inheritance, according to what was usual of olden time. Also the authority of the lord is dissolved sometimes by manumission, as where a lord emancipates his serf, under whatever form of manumission, according to what will be set forth hereafter under the head of manumissions.

2. Of a subdivision of persons who are under the authority of others.

The first division of persons was this, that all persons are either free or serfs; the second, that some persons are independent, and others are dependent upon others. Now follows another division, that of persons who are under the authority of others: some are in the custody or guardianship of lords, some under the curatorship of relations or of friends, according as will be more fully explained on the subject of wardship and curatorship. Some, however, are bound by neither right, as those who are of full age. And in what way curatorship and guardianship are terminated will be explained more fully below. Also some are under the rod, as wives, &c.

3. Qualiter solvitur dominica potestas in servis fugitivis. Britton, l. i. ch. xxxii. § 9. Fleta, 3.

Servi autem sub potestate dominorum sunt, nec solvitur dominica potestas, quamdiu manentes fuerint in villenagio levantes et cubantes, sive terram tenuerint sive non. Item si non sunt manentes in villenagio sed vagantes per patriam, euntes et redeuntes, semper sub potestate dominorum sunt, quamdiu redierint, et cum consuetudinem revertendi habere desierint, incipiunt esse fugitivi, ad similitudinem cervorum domesticorum. Item si cum vagantes fuerint, sicut mercatores vel mercenarii, certis temporibus chevagium solvunt (quod dicitur recognitio in signum subjectionis et dominii de capite suo), et quamdiu chevagium solverint, dicuntur esse sub potestate dominorum, nec solvitur dominica potestas. Et cum solvere desierint incipiunt esse fugitivi, et si aliquo prædictorum modorum fugam fecerint, statim prosequi debent, et petentur infra tertium vel quartum diem, donec fuerint comprehensi et reducti, ubicunque fuerint inventi, nec debet aliquis eos impedire ratione alicujus libertatis vel privilegii, quia dominus servorum illorum semper retinet dominium, donec illud amittat per negligentiam vel per violentiam, et injustam resistentiam, et cum ille, qui prosequitur, resistere non possit, tunc oportebit ad superiorem recurrere, ut sibi perquirat per breve; nisi ita sit forte, quod ille fugitivus infra annum ad villenagium suum revertatur, et a domino comprehendatur et detineatur, quod quidem licite potest facere dominus, quia ante annum completum nullum habere potest privilegium fugitivus. Nec etiam si dominus infra annum clameum suum qualitercunque apposuerit, si fugitivus post annum redierit, licite retinere poterit, nec currit tempus contra dominum, cum res per clameum appositum efficiatur

f. 7. Britton, l. i. ch. xxxii. § 8. Fleta, 3.

3. In what way the lord's power is dissolved in the case of runaway serfs.

Serfs, also, are under the authority of their lords, nor is the lord's authority dissolved, as long as they abide in villenage, rising [from their bed] and going to their bed, whether they hold land or not. Likewise, if they are not abiding in villenage, but wandering through the country, going forth and coming back, they always remain under the authority of their lords, as long as they return; and when they have ceased to have the custom of returning, they begin to be runaways, after the likeness of tame deer. Likewise, if, when they have been wandering in the character of merchants or of mercenaries, they pay (chevage) headmoney (by which term is meant a recognition in sign of subjection and of dominion over their persons), and as long as they pay headmoney, they are said to be under the authority of their lords, nor is the power of their lords dissolved; and when they cease to pay it, they begin to be runaways; and if they have run away in any of the aforesaid modes, they ought to be pursued immediately, and they should be sought after within the third or fourth day, until they have been taken and brought back, wheresoever they may have been found; nor ought any one to hinder their pursuers under pretext of any liberty or privilege, for the lord of those serfs always retains his dominion f. 7. over them until he loses it by negligence or by violence and unrightful resistance; and when he, who pursues, cannot resist [the hindrance], then he may have recourse to a superior, that he may make a perquisition by writ, unless it should happen, that the runaway returns to his villenage within a year, and is seised and detained by his lord, which indeed the lord is allowed to do, for before a year is completed a runaway serf has no privilege. And, further, if the lord shall have lodged his claim in any manner, if the runaway shall return after a year, he is allowed to retain him, nor does time run against the lord, if the matter by his lodging a claim has been put in suit. And by this means the action may

litigiosa. Et per hoc perpetuetur actio imposterum, et elidatur privilegium. Si autem dominus ille negligens fuerit in prosequendo, et in clameo apponendo qualitercunque, si fugitivus revertatur post annum, non erit domino licitum nec tutum manum apponere, tamen post annum potest fugitivus habere privilegium, et se in statu libero defendere per exceptionem, et sic solvitur dominica potestas. Et dicuntur servi esse in statu libero, donec dominus versus eos sibi perquisierit per legem terræ, nec habebit potestatem aliquam in eis vel liberis suis, terris vel aliis bonis ipsorum, donec corpus, quod principale est, disrationaverit, secundum quod inferius dicetur. Cum autem dominus per negligentiam vel impotentiam sui seysinam de suo fugitivo amiserit, si resumptis viribus contra privilegium fugitivum reduxerit, vel cum fugitivus redierit, ipsum retinuerit, pœnam debitam non evadet, cum hoc sit contra pacem. Sed si extra villenagium, scilicet per lapsum trium vel quatuor dierum inventus fuerit, cum dominus negligens fuerit in prosequutione, capi non poterit nec detineri, nec magis quam liber homo, et si fuerit, inde habebit querelam de imprisonamento. Infra plus de hac materia, de placito de nativis et fugitivis, qualiter revocantur in servitutem, qui sunt extra potestatem dominorum et in fuga.

Cap. XI.

1. De diversis conditionibus personarum tenentium in

In dominico domini regis plura sunt genera hominum; sunt enim ibi servi, sive nativi ante conquestum, in conquestu, et post, et tenent villenagia et per villana servitia et incerta, qui usque in hodiernum diem vil-

perpetuated for the future, and the privilege may be evaded. But if that lord has been negligent in pursuing and in lodging a claim howsoever, and the runaway shall return after a year, it shall not be allowed nor be safe for the lord to lay his hand upon him; nevertheless after a year, a runaway may have his privilege and maintain himself in a free condition by an exception, and so the power of the lord is dissolved. And serfs are said to be in a free condition, until the lord shall claim them for himself through the law of the land, nor shall he have any authority over them, or their children, lands, or other goods of theirs, unless he shall have dereigned their body, which is the principal thing according to what shall be explained below. But when the lord, through his negligence or powerlessness, shall have lost the seisin of his runaway [serf], if, having recovered power, he shall have brought back the runaway in spite of his privilege, and when the runaway has returned shall have retained him, he shall not escape the penalty due, since this is against the peace [of the realm]. But if he be found beyond the villenage after the lapse of three or four days, when the master will have been negligent in pursuit, he cannot be taken nor detained, any more than a free man; and if he shall have been [taken and detained], he shall have his plaint for imprisonment. Below more upon this subject, concerning the plea respecting natural-born and runaway [serfs], in what manner they are reclaimed into servitude, when they are beyond the authority of their lords, and in flight.

Chapter XI.

1. Of the different conditions of persons tenants in the de-

In the demesne of the lord the king there are several kinds of persons; for there are serfs there, either natural born before the conquest, at the time of the conquest, or after the conquest, and they hold villenages, and by villein and uncertain services, who down to the present day perform villein and uncertain customs and whatever

dominico domini regis. Britton, l. iii. ch. ii. § 11. Fleta, 4.

lanas faciunt consuetudines et incertas, et quicquid eis præceptum fuerit (dum tamen licitum et honestum). Fuerunt etiam in conquestu liberi homines, qui libere tenuerunt tenementa sua per libera servitia, vel per liberas consuetudines, et cum per potentiores ejecti essent, postmodum reversi receperunt eadem tenementa sua tenenda in villenagio, faciendo inde opera servilia, sed certa et nominata, qui quidem dicuntur glebæ ascripticii, et nihilominus liberi, quia licet faciant opera servilia, cum non faciunt ea ratione personarum, sed ratione tenementorum, et ideo assisam novæ disseisinæ non habebunt, quia tenementum est villenagium, quamvis privilegiatum, sed nec assisam mortis antecessoris; sed tantum parvum breve de recto, secundum consuetudinem manerii, et ideo dicuntur glebæ ascripticii, quia tali gaudent privilegio, quod a gleba amoveri non poterunt, quamdiu solvere possunt debitas pensiones, ad quoscunque pervenerit dominicum domini regis, nec compelli poterint ad tale tenementum tenendum nisi voluerint. Est etiam aliud genus hominum in manerio domini regis, et tenent de dominico et per easdem consuetudines et servitia villana, per quæ supradicti et non in villenagio, nec sunt servi nec fuerunt in conquestu ut primi, sed per quandam conventionem, quam cum dominis fecerunt, et ita quod quidam eorum cartas habent et quidam non. Et qui, si a talibus, tenementis ejecti fuerint, seisinam recuperabunt (sed[1] secundum quosdam) per assisam novæ disseisinæ, et cum assisam novæ disseisinæ habuerint, hæredes habebunt assisam mortis antecessoris.

Britton, l. i. ch. xxxii. § 2.

f. 7 b.

2 De liberis in manerio regis.

Sunt et alia genera hominum in maneriis et dominicis domini regis, qui sicut alibi tenent libere, et in libero socagio, et per servitium militare ex novo feoffamento, et post conquestum.

[1] "Sed" omitted, Rawl.

is enjoined them, (provided it be allowable and honest). There have been also at the time of the conquest free men, who held freely their tenements by free services or by free customs, and when they had been expelled by more powerful persons, they afterwards, having returned, received back the same tenements of theirs to be held in villenage, by performing for them villein services, but of a certain and express kind. These are said to be ascribed to the soil, and are nevertheless free, because, although they do villein services, they do not do them by reason of their persons, but by reason of their tenements, and on that ground they shall not have an assise of novel disseisin, for their tenement is a villenage, although privileged, nor shall they have an assise of the death of an ancestor, but only a short writ of right according to the custom of the manor, and therefore they are termed "ascribed," for they enjoy a privilege of this kind, that they cannot be removed from the soil, as long as they can pay the payments due to those, to whomsoever the demesne of the lord the king may have come, nor can they be compelled to hold such a tenement, unless they choose. There are also persons of another kind in the manor of the lord the king, and they hold of the demesne and by the same customs and villein services, by which the aforesaid [persons hold], yet not in villenage, nor are they serfs, nor were they at the conquest as the first [mentioned], but by a certain convention, which they have made with the lords, and so that some have charters and some not; and who, if they be ejected from such tenements, will recover seisin, but according to some, by an assise of novel disseisin, and when they have had an assise of novel disseisin, their heirs shall have an assise of the death of an ancestor.

mesne of the lord the king.

f. 7 b.

2. Of free persons in the king's manor.

There are other kinds of persons in the manors and in the demesnes of the lord the king, who, as elsewhere, hold freely, and in free sockage, and by military service upon a new enfeofment and after the conquest.

3. Quod sub potestate domini sunt liberi homines.

Item sub potestate dominorum sunt liberi homines possessi ut servi, et qui aliquando in libertatem proclamant, et qui dici poterunt statu servi, cum sint liberi eadem ratione, qua servi dici poterunt statu liberi, cum sint fugitivi, et extra potestatem dominorum, de quibus plenius dicetur infra.

Cap. XII.

1. De rebus et rerum divisione.

Superius dictum est de personis et statu hominum et jure personarum; consequenter dicendum erit de rebus per divisionem, quia res per divisionem melius aperiuntur.

2. Prima divisio. Inst. II. iii. Dig. VIII. 1.

Rerum autem prima divisio hæc est, quod rerum quædam sunt in patrimonio nostro, et quædam extra. In patrimonio nostro sunt res tam mobiles, quam immobiles, quibus pro voluntate et necessitate nostra nobis uti licet, de quibus satis patebit inferius. Extra patrimonium autem dicuntur res sacræ, et religiosæ, et communes. Quædam vero nec sunt in patrimonio nec extra, sicut jura et servitutes, usus fructus. Item actus, via et aquæ ductus, et hujusmodi, et ideo non dicuntur servitutes esse in bonis, quia per se et sine fundo alienari non possunt. Item prædiales servitutes per se non censentur, et ideo videntur non esse, vel extinctæ esse, si censeantur per se. Nam et manica videtur extincta, cum non accedit vestimento, et tignum videtur non possideri, cum non accedit ædificio, sed tamen non dicun-

Inst. II. iii. § 3.

Also, there are free men under the authority of lords, held as serfs, and who sometimes lay claim to liberty, and who may be said to be of servile condition although they are free, in the same way in which serfs may be said to be of free condition, when they are runaways and beyond the authority of their lords, respecting whom we shall speak more fully below. 3. That free men are under the authority of the lord.

Chapter XII.

We have treated above concerning persons, and the condition of persons and the right of persons; we must next treat of things by a division of them, for things are better explained by dividing them. 1. Of things and the division of things.

But the first division of things is this, that some things are within our patrimony and some are beyond it. Things are within our patrimony as well moveables as immoveables, which we are allowed to use according to our will and our necessity, concerning which sufficient explanation will be given below. But things which are said to be beyond our patrimony are things, [which are] sacred or are dedicated to religion, or are common. But certain things are neither within nor beyond our patrimony, such as rights and servitudes, uses and fruits. Likewise bridleways, roads, and aqueducts, and such like, and therefore servitudes are not reckoned amongst goods, for they cannot be alienated of themselves and without the ground. Likewise, prædial servitudes are not taxed, and therefore they seem not to exist or to have been extinguished, if they are taxed by themselves. For a sleeve seems to be extinguished, if it is not fixed to a robe, and a tile seems not to be possessed, if it is not fixed upon a building, yet those servitudes are not said to be outside [the class of] goods, since those who possess 2. The first division.

tur istæ servitutes esse extra bona, cum possidentes exceptionem, et non possidentes habeant actionem.

3. Secunda divisio. Inst. II. iii. §§ 1, 2.

Fit et alia et secunda divisio rerum, quia aliæ sunt corporales, aliæ incorporales. Corporales vero sunt, quæ tangi possunt, sicut terra, fundus, res immobiles vel res mobiles, quæ se movere possunt, sicut animalia vel hujusmodi, vel moveri. Incorporales vero sunt, sicut sunt jura, quæ videri non possunt nec tangi, ut jus eundi, agendi, aquamve ducendi, et hujusmodi, quæ non possidentur sed quasi.

4. Tertia divisio.

Est et tertia divisio rerum, quod aliæ sunt communes, aliæ publicæ, aliæ universitatis, aliæ nullius, et aliæ singulorum, quæ variis ex causis, cuique acquiruntur.

5. Quædam res sunt communes secundum divisionem interius. Inst. II. i. § 1. f. 8.

Naturali vero jure communia sunt omnia hæc, aqua profluens, aer et mare, et littora maris, quasi maris accessoria. Nemo enim ad littus maris accedere prohibetur, dum tamen a villis et ædificiis abstineat, quia littora sunt de jure gentium communia, sicut et mare. Ideo ædificia, si in mari, sive in littore posita fuerint, ædificantium sunt de jure gentium, et ita in hoc casu solum cedit ædificio, licet alibi contrarium, quia ædificium cedit solo.

6. Quædam publica. Inst. II. i. § 2. Dig. I. vii. § 5.

Publica vero sunt omnia flumina et portus. Ideoque jus piscandi omnibus commune est in portu, et in fluminibus. Riparum etiam usus publicus est de jure gentium, sicut ipsius fluminis. Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquid in iis reponere, cuivis liberum est, sicuti per ipsum fluvium navigare; sed proprietas earum est illorum, quo-

them have a right of exception, and those who do not possess them, have a right of action [on their account].

3. The second division.

There is also another and second division of things, because some are corporeal and others incorporeal. Corporeal things are such, as may be touched, as land, ground, immoveables, or moveables, which can move themselves, as animals or such like, or [which] can be moved. But incorporeal things are such as rights, which cannot be seen nor touched, as the right of going, or of driving or of leading water, and such like, which cannot [in fact] be possessed, but [only] can be as it were possessed.

4. The third division.

There is also a third division of things, which are some common, others public, others belonging to corporate bodies, others belonging to no person, and others belonging to individuals, which are acquired by each from various causes.

5. Some things are common, according to the inner division.

Of natural right all these things are common: flowing water, air and sea, and the shores of the sea, as being as it were approaches to the sea. For no one is prohibited from approaching to the sea provided he abstains from the villas and buildings, for the shores are by the right of nations common, like the sea. Accordingly buildings, if they are placed in the sea or upon the shore, belong to the builders by the right of nations, and so in this case the ground goes with the building, although elsewhere on the contrary the building goes with the ground. f. 8.

6. Some things are public.

All rivers and ports are public, and accordingly the right of fishing in a port and in rivers is common to all persons. The use of the banks is also public by the right of nations, as of the river itself. It is free to every person to moor ships there to the banks, to fasten ropes to the trees growing upon them, to land cargoes and other things upon them, just as to navigate the river itself, but the property of the banks is in those

Azo in II. Inst., p. 1062.

rum prædiis adhærent, et eadem de causa arbores in eisdem natæ eorundem sunt; et hæc intelligenda sunt de fluminibus perhennibus, quia temporalia possunt esse privata. Nota hic differentiam inter publicum et commune.[1] Publica autem ita accipiunt, quæ sunt omnium populorum, id est, quæ spectant ad usum hominum tantum. Communia vero dici poterunt aliquando, quæ sunt omnium animantium.

7. Quædam universitatis. Inst. II. i. § 6. Azo, p. 1062.

Universitatis vero sunt, (non singulorum,) quæ sunt in civitatibus, ut theatrum, stadia et hujusmodi, et si qua sunt in civitatibus communia. Dicuntur vero theatra a theorando, id est inspiciendo. Stadium vero dicitur octava pars milliarii, quod (ut dicitur) Hercules uno anhelitu currebat, et postea stabat. Et dicuntur ista universitatis dominio et usu. Usualia autem dicuntur universitatis esse non usu, sed dominio et fructu, ut fundi et servi, id est civitatum, qui ita sunt omnium civium, ita quod nullius per se.

8. Quædam sacræ et religiosæ, quæ sunt Deo consecratæ. Inst. II. i. § 7.

Res vero sacræ, religiosæ, et sanctæ in nullius bonis sunt; quod enim divini juris est, id in nullius hominis bonis est, immo in bonis Dei hominum censura.

9. Quædam singulorum. Inst. II. i. § 11.

[2] Item, sunt res singulorum, ut mea et tua, dominio et usu, sicut fundi, civitates et servi. Et sunt sacra, quæ rite et per pontifices Deo consecrata sunt, veluti ædes sacræ et religiosæ, et dona, quæ rite ad ministerium Dei dedicata sunt, ut calices, cruces, et thuribula,

[1] "Nota hic differentiam inter "publicum et communem" omitted in MSS. Crewe, Gl., Gal., and Rawl.

[2] This paragraph, "Item sunt" to "servi," seems to be out of place. It is absent from Azo's text, which Bracton follows very closely.

whose lands they adjoin, and for the same cause the trees growing upon them belong to the same persons, and this is to be understood of perennial rivers, because streams, which are temporary, may be property. Note this difference between what is public and what is common. Those things are reckoned as public, which are enjoyable by all persons, that is, which regard the use of human beings alone. But things may be sometimes termed common, which are enjoyable by all animals.

7. Some things belong to corporate bodies.

Things belong to corporate bodies and not to individuals, which are in cities, such as theatres, stadia, and such like, and if there are any things in cities, which are common. Theatres are so called from "theorando," that is, inspecting. The eighth part of a mile is termed a stadium, which, as it is said, Hercules ran over at a single breath, and afterwards stopped. These things are said to belong to corporate bodies as regards both the dominion and the use. But the use of things is said to belong to corporate bodies, not as regards their [actual] use, but as regards their dominion and products, such as lands and serfs, which are said to belong to cities, because they so belong to all the citizens, as not to belong to any one person by himself.

8. Some things are sacred and religious, which are consecrated to God.

Things which are sacred, religious, and hallowed are not the property of any one person, for that which is under [the protection of] divine right, is not any man's property; on the contrary, it is the property of God by the census of man.

9. Some things belong to individuals.

Likewise, there are things which belong to private persons, as mine and thine, as regards both the dominion and the use, such as lands, cities, and serfs. Sacred things are those, which have been consecrated to God with solemnities and by the pontiffs, such as sacred and religious buildings, and gifts, which have been solemnly dedicated to the service of God, as cups, crosses, and

Britton, l. ii. ch. ii. § 2. Fleta, 174. Inst. II. i. §§ 8, 10. Azo, p. 1062.

quæ alienari, prohibentur, excepta causa redemptionis captivorum. Item loca sacra sunt cœmiteria et capellæ et ecclesiæ, et licet ædificia diruantur, adhuc locus sacer manet. Et differt sacrum a sacrario, quia sacrarium dicitur locus ubi sacra reponuntur. Sacræ etiam res sunt, veluti muri et portæ civitatis, et ideo dicuntur muri sancti, quia pœna capitalis constituta est in eos, qui aliquid in muros sanctos delinquunt, violando aliquid in hiis vel immittendo, vel transcendendo, scalis adhibitis, vel alia qualibet ratione; quia hostile est et abhominabile alias ingredi, quam per portas, dicitur enim sanctum quod defensum est et munitum ab injuria hominum, et lex illa specialiter dicitur sanctio, quia pœnam imponit injurioso. Muros vero municipales reficere non licet alicui ad privatum commodum, sed ad publicam utilitatem.

10. Quædam nullius. Britton, l. ii. ch. ii. § 5. Fleta, 174, 175. Inst. II. ii. § 12.

Res quidem nullius esse dicuntur pluribus modis, natura sive jure naturali, ut feræ bestiæ, volucres, et pisces. Item censura (ut dictum est), sicut res sacræ, religiosæ et sanctæ. Item casu, sicut est hæreditas jacens ante aditionem; sed fallit in hoc, quia sustinet vicem personæ defuncti, vel quia speratur futura hæreditas ejus, qui adibit. Dicuntur etiam res in nullius bonis esse, quæ habitæ sunt pro derelicto. Item tempore dicuntur res in nullius bonis esse, ut thesaurus. Item ubi non apparet dominus rei, sicut est de wrecco maris. Item de hiis quæ pro wayvio habentur, sicut de averiis, ubi non apparet dominus, et quæ olim fue-

censers, which it is forbidden to alienate except for the purpose of redeeming captives. Likewise, sacred places are cemeteries and chapels and churches, and although the buildings have been destroyed, the ground continues to be sacred. A sacred thing differs from a sacrarium, because the place, where sacred things are kept, is termed a sacrarium. But hallowed things are such things as the walls and gates of a town, and the walls are for this reason termed hallowed, because capital punishment is established against those, who commit any offence against hallowed walls by violating anything in them, or by striking anything against them, or by mounting over them, by applying ladders or in any other way, for it is an enemy's act, and abominable to enter them in any way except through the gates, for that is said to be hallowed, which is protected and fortified against the injury of men, and the law is specially termed a sanction, because it imposes a penalty upon the injurer. But it is not allowable for any person to restore the public walls for his own convenience, but for the public advantage.

10. Some things belong to no person.

Things are said to belong to no person in several ways: By nature or of natural right, as wild beasts, birds, and fish. By the census, as it is termed, as, for instance, things which are sacred, or religious, or hallowed. Also by accident; as, for instance, a vacant inheritance before a claim is made to it; but it fails in this respect, because it represents a dead person, or because it is expected to become the inheritance of him who shall claim it. Things are likewise said to be without an owner, which are regarded as derelict. Likewise, things are temporarily regarded as without an owner; as, for instance, treasure-trove. Likewise, where no owner of the thing appears, as of wreck of the sea. Likewise, of things which are regarded as waifs; as goods which come ashore, where the owner does not appear, and which formerly belonged

runt inventoris de jure naturali, jam efficiuntur principis de jure gentium. Item sunt res natura nullius,
f. 8 b. ubi natura non patitur, quod possent esse alicujus, sicut sunt liberi homines, liberi enim homines exempti sunt a dominio et commercio, et illud idem dici poterit de servo ægrotante, quem dominus abjecit, lex enim facit ei, ut sit liber.

to the finder by natural right, but are now held to belong to the sovereign by the right of nations. Likewise, things are by nature nobody's property, where nature does not permit them to be any person's property ; as, for f. 8 b.
instance, free men, for free men are exempt from dominion and commerce ; and the same may be said of an invalid serf, whom his lord has abandoned, for the law operates for him, that he is free.

HENRICI DE BRACTON

DE

LEGIBUS ET CONSUETUDINIBUS ANGLIÆ.

LIBER SECUNDUS.

Cap. I.

1. Qualiter acquiruntur rerum dominia. Azo, Inst. II. i.

Dictum est supra de rerum divisione, nunc autem dicendum est qualiter dominia rerum acquiruntur, de jure naturali sive gentium; ut a vetustiore jure incipiatur, quod cum ipso genere humano rerum natura prodidit, et post dicendum erit de jure civili, quod postea esse cepit, cum et civitates condi, et magistratus creari et leges scribi ceperunt.

2. De jure naturali sive gentium per occupationem, et de feris bestiis. Inst. II. i. §§ 11, 14. Dig. XLI. i. § 3.

Jure autem gentium sive naturali dominia rerum acquiruntur multis modis. Inprimis per occupationem eorum, quæ non sunt in bonis alicujus, et quæ nunc sunt ipsius regis de jure civili, et non communia, ut olim; sicut sunt feræ bestiæ, volucres et pisces, et omnia animalia, quæ in terra et in mari et in cœlo et in aere nascuntur, ubicunque capiantur, et cum capta fuerint, incipiunt esse mea; quia mea custodia coercentur, et eadem ratione, si evaserint custodiam meam et in naturalem libertatem se receperint, desinunt esse mea, et rursus fiunt occupantis. Recipiunt autem na-

THE SECOND BOOK

OF

HENRICUS DE BRACTON

ON THE

LAWS AND CUSTOMS OF ENGLAND.

Chapter I.

We have treated above concerning the division of things; we must now treat of the ways, in which the dominion over things is acquired by natural right, or by the right of nations. To commence with the older right, which the nature of things has introduced with the human race, and afterwards we will speak of civil right, which came into existence subsequently, when cities came to be founded, and magistrates created, and laws reduced into writing. 1. In what ways the dominion over things is acquired.

The dominion over things by natural right or by the right of nations is acquired in various ways. In the first place, through the first taking of those things, which belong to no person, and which now belong to the king by civil right, and are not common as of olden time, such, for instance, as wild beasts, birds, and fish, and all animals which are born on the earth, or in the sea, or in the sky, or in the air; wherever they may be captured, and wherever they shall have been captured, they begin to be mine, because they are coerced under my keeping, and by the same reason, if they escape from my keeping and recover their natural liberty they cease to be mine, and again belong to the first taker. But they recover 2. By natural right or by the right of nations, through occupation.

turalem libertatem tunc, cum vel oculos meos effugerint in aere libero et non sub captura mea, vel ita sunt in conspectu meo, ut impossibilis sit eorum persecutio.

3. De piscatione, venatione, et apprehensione et apium inclusione. Inst. II. i. § 13. Britton, l. ii. ch. ii. § 4. Fleta, 175.

Item continet occupatio piscationem, venationem, et apprehensionem. Et nec sola persequutio facit rem esse meam. Nam etsi feram bestiam vulneraverim ita, ut capi possit, non tamen est mea, nisi eam cepero, imo erit potius occupantis, quia multa accidere solent, ne capiam. Item si in laqueum, quem venandi causa tetendi, aper inciderit, et cum coertione eum exemptum abstuli, erit meus, si in potestatem meam pervenerit, nisi consuetudo vel privilegium se habeat in contrarium. Continet et occupatio inclusionem, ut in apibus, quarum fera est natura, nam si in arbor mea consederint, non magis sunt meæ, antequam a me alveo includantur, quam volucres, qui in arbore mea fecerint nidum, et ideo si alius incluserit eas, earum dominus erit. Examen etiam quod ex alveo meo evolaverit, eo usque meum esse intelligitur, quamdiu in conspectu meo est, nec sit impossibilis ejus persequutio, alioquin occupantis sit, sed si quis illud ceperit, suum non facit, si sciverit ipsum esse alienum, sed furtum facit, nisi animum habeat restituendi. Et hæc vera sunt, nisi aliquando de consuetudine in quibusdam partibus aliud fiat.

Inst. II. i. § 14. Dig. XLI. i. § 5.

f. 9.

4. De mansuetis bestiis et avibus. Azo, f. 1064. § 25.

Hæc, quæ dicta sunt, locum habent in animalibus, quæ omni tempore fera permanserunt; si autem animalia fera facta fuerint mansueta, et ex consuetudine eunt et redeunt, volant et revolant, ut sunt cervi,

their natural liberty, then, when they have either escaped from my sight in the free air, and are no longer in my keeping, or when they are within my sight under such circumstances, that it is impossible for me to overtake them.

3. Of fishing, hunting, and capturing, and of the shutting up of bees.

Occupation also comprises fishing, hunting, and capturing; pursuit alone does not make a thing mine, for although I have wounded a wild beast so that it may be captured, nevertheless it is not mine unless I capture it; on the contrary, it will belong to him who first takes it, for many things usually happen to prevent the capturing it. Likewise, if a wild boar falls into a net which I have spread for hunting, and I have carried it off, having with much exertion extracted it from the net, it will be mine, if it shall have come into my power, unless custom or privilege rules to the contrary. Occupation also includes shutting up, as in the case of bees, which are wild by nature, for if they should have settled on my tree they will not be any the more mine, until I have shut them up in a hive, than birds which have made a nest in my tree; and therefore if another person shall shut them up, he will have the dominion over them. A swarm, also, which has flown away out of my hive, is so long understood to be mine, as long as it is in my sight, and the overtaking of it is not impossible, otherwise they belong to the first taker; but if a person shall capture them, he does not make them his own if he shall know that they are another's, but he commits a theft, unless he has the intention to restore them. And these things are true, unless sometimes from custom in some parts the practice is otherwise. f. 9.

4. Of tame beasts and birds.

What has been said above applies to animals, which have remained at all times wild; and if wild animals have been tamed, and they by habit go out and return, fly away and fly back, such as deer, swans, seafowls, and

Inst. II. i. § 15. Dig. XLI. i. § 6.

cygni, pavones, et columbæ et hujusmodi, alia regula comprobata est, ut eousque nostra intelligantur, quamdiu habuerint animum revertendi. Nam si revertendi animum habere desierint, nostra desinunt esse. Revertendi autem animum videntur desinere habere, cum consuetudinem revertendi deseruerint. Idemque dicitur de gallinis et anseribus feris factis ex mansuetis. In domesticis vero tertia regula comprobata est, quod licet conspectum meum effugerint anseres mansueti et gallinæ, quocunque tamen loco sunt, mei intelliguntur esse, et furtum facit, qui ea animo lucrandi retinuerit.

Inst. II. i. § 17. Dig. XLI. i. § 7.

Habet etiam locum ista species occupationis in iis, quæ ab hostibus capiuntur, ut si liberi homines in servitutem nostram deducantur, et potestatem nostram evaserint, pristinum statum recipiunt.

Inst. II. i. § 18. Dig. XLI. i. § 7. Britton, ii. ch. ii. § 5.

Item locum habet eadem species occupationis in iis, quæ communia sunt, sicut in mari et littore maris, in lapillis et gemmis, et cæteris in littore maris inventis. Idem etiam in insulis in mari natis, et in similibus, et in rebus pro derelicto habitis, nisi consuetudo se habeat in contrarium propter fisci privilegium.

Cap. II.

1. De modo acquirendi per accessionem. Inst. II. i. §§ 16, 17, 18, 22. Dig. XLI. i. § 7. Azo, f. 1064, § 29.

Acquiruntur etiam jure gentium rerum dominia per accessionem discretam, vel secretam, concretam seu continuam, et quæ ex animalibus dominio tuo subjectis nata sunt, tibi acquiruntur. Item quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Est autem alluvio latens incrementum, et per alluvionem adjici dicitur, quod ita paulatim adjicitur, quod intelligere non possis, quo momento temporis adjiciatur.

doves and such like, another rule has been approved, that they are so long considered as ours, as long as they have the disposition to return; for if they have no disposition to return, they cease to be ours. But they seem to cease to have the disposition to return, when they have abandoned the habit of returning; and the same is said of fowls and geese, which have become wild after being tame. But a third rule has been approved in the case of domestic animals, that although tame geese and fowls have escaped out of my sight, nevertheless in whatever place they may be, they are understood to be mine, and he commits a theft who retains them with the intention of making gain with them. This kind of occupation also takes place in the case of those things, which are captured from the enemy; as for instance, if free men have been reduced into slavery and shall escape from our power, they recover their former state. Likewise, the same species of occupation has a place in [the case of] those things which are common, as in [the case of] the the sea and the sea-shore, in [the case of] stones and gems and other things found on the sea-shore. The same rule applies to islands, which spring up in the sea, and to things left derelict, unless there is a custom to the contrary in favour of the public treasury.

Chapter II.

1. Of the mode of acquiring by accession.

The dominion over things is acquired by the right of nations, by accession discrete or separate, concrete or continuous, and whatever is born of animals subject to your dominion is acquired for you. Likewise, whatever a river has added to your land by alluvion, is acquired for you by the right of nations. But alluvion is a latent increase, and that is said to be added by alluvion, whatever is so added by degrees, that it cannot be perceived, at what moment of time it is added; for although you fix

Nam etsi tota die infigas intuitum tuum, imbecillitas visus tam subtilia incrementa perpendere non potest, ut videri poterit in cucurbita et similibus. Si autem non sit latens incrementum imo apparens, contrarium erit, ut ecce, vis fluminis partem aliquam ex tuo prædio detraxit et vicini prædio appulit, certum est eam tuam permanere, et si longiori tempore fundo vicini adhæserit, et arbores, quas secum traxerit in eum fundum radices egerint, ex eo tempore videntur fundo vicini acquisitæ. Dabitur tamen priori domino utilis vendicatio, secundum quosdam, sed cessat rei vendicatio, quia alterius facta est crusta, et alia dicenda est arbor, aliæ terræ alimento.

2. De insulis natis in flumine.

Inst. II. i. §§ 21, 22. Dig. XLI. i. §§ 7, 3.

f. 9 b. Britton, l. ii. ch. ii. § 8. Fleta, 176.

Habet etiam locum eadem species accessionis in insula nata in flumine, quæ, si quidem mediam partem fluminis teneat, communis est eorum, qui pro indiviso ab utraque parte fluminis prope ripam prædia possident, pro modo latitudinis cujuscunque fundi, quæ latitudo prope ripam sit; quod si alteri parti proximior sit, eorum est tantum, qui ab ea parte prope ripam prædia possident. Si autem insula in mari nata sit, quæ raro accidit, occupantis fit, non tamen credas proprium alicujus agrum in formam insulæ redactum, insulam esse, ut ecce, flumen dividitur in superiori parte et circuit agrum alicujus, et demum infra unitur, quo casu ejus erit ager, cujus prius fuerat. Cavendum quoque erit in metienda vicinitate insularum, quia potest quis in hoc de facili decipi. Ponatur igitur punctus quidam in medio inter utrumque agrum, et secundum hoc, si insula citra punctum sit, vel hujus tantum, vel illius tantum erit. Si autem sit et citra punctum, et

your eyesight upon it for a whole day, the infirmity of sight cannot appreciate such subtle increments, as may be seen in the case of a gourd, and such like. But if the increment is not latent, but appareut, the contrary will result; as, for instance, the force of the stream has carried off some part of your meadow and joined it to the meadow of your neighbour, it is certain that it remains yours, and if it should adhere for a longer time to the ground of your neighbour, and the trees which it has carried away with it have struck their roots into his ground, from that time forth it seems to be an acquisition to your neighbour's ground; the first owner, however, will have a claim to the use of it, according to some, but the claim to the thing itself is at end, because it has become a parcel of the other's ground, and the tree is to be regarded as a different tree, being nourished by a different soil.

2. Of islands, which are formed in a river.

The same species of accession takes place in the case of an island which is formed in a river, which, if it occupies the mid-channel, is common to those indivisibly, who on either side of the stream have farms on the edge of the bank, according to the width of the farm on the edge of the bank; but if it be nearer to one side, it belongs to those only, who on that side have lands on the edge of the bank. But if an island springs up in the sea, which rarely happens, it belongs to the first occupier. You must not, however, believe that the private land of another, [if it should be] reduced into the shape of an island, is an island; as, for instance, a river is divided in the upper parts and encircles the land of a person and unites again below it, in which case the land will remain the property of him, to whom it first belonged. Care also must be taken in measuring the nearness of islands, because a person may be easily deceived in such a matter. Let a point therefore be fixed midway between the two lands, and according as the land is within the the point, it will be the sole property of the one or of the f. 9 b.

Dig. XLI. i. § 29. in ipso puncto, et ultra, tunc pro indiviso communis erit, ut tantum mihi de ipsa insula cedat, quantum continetur a medietate puncti usque ad agrum meum, et sic fiat in persona vicini quoad divisionem. Et videtur, quod vicinitas et remotio insulæ considerari debet secundum principium nativitatis suæ, et inde erit, quod si inter insulam, quæ mihi proximior est, et contrariam ripam vicini, quæ est ultra flumen, alia sit nata insula, mensura fiet a mea insula et non ab agro meo. Et hæc omnia tenenda sunt in insula, quæ alvei solo

Dig. XLI. i. § 65. adhæret, et non quæ virgultis sustentatur. Si autem insula rotunda inveniatur, difficile erit eam metiri, hoc tamen observetur, quod omne quod propinquius est, mihi cedat, et ita vicino cedat, quod ei vicinius erit, et hoc nunquam fallet. Habet etiam locum hæc in agris non limitatis; nam in limitatis non habet locum jus alluvionis. Sunt autem limitati, qui assignantur aliquibus certis locis et certis terminis, ubi scitur, quid cui sit

Dig. XLI. i. § 16. datum, quid retentum et relictum. Præterea agris limitatis non cedit insula ratione vicinitatis in flumine publico, imo conceditur occupanti, et per consequens regi propter suum privilegium. Habet etiam locum eadem species accessionis in alveo fluminis, a flumine derelicto. Cedit enim eis, qui prope ripam fluminis prædia possident, pro modo scilicet latitudinis cujuscunque agri, quæ latitudo prope ripam sit. Novus autem alveus ejusdem juris incipit esse, cujus et ipsum flumen, id est publicum. Flumen enim, alveum sibi constituendo, agrum privatum facit publicum, et publicum privatum. Et ideo dicuntur flumina vice censitorum,

other; but if it be within the point, and on the point, and beyond the point, then it will be common indivisibly, that so much of the island itself shall devolve to me, as much as is contained from the middle of the point to my land, and it shall be similarly done towards the person of my neighbour, as regards the division. And it seems that the nearness and the remoteness of the island ought to be considered according to the commencement of its birth, and so it will result, that if between the island which is nearer to me and the opposite bank of my neighbour, which is beyond the river, another island shall have sprung up, the measurement shall be made from my island and not from my land. And all these things are to be maintained in an island, which adheres to the soil of the channel, and which is not supported by shrubs. But if the island be found to be round, it will be difficult to measure it; this, however, is to be observed that everything which is nearer [my land] devolves to me, and so also, what is nearer to my neighbour accrues, to my neighbour; and this [rule] never fails. But this holds place in cases of land which is not limited, for in the case of land limited, the right of alluvion has no place. But lands are limited, which are assigned to individuals in certain localities and by certain boundaries, where it is known what is given to each, and what is retained or left. Besides, an island in a public river does not accrue to limited lands by reason of neighbourhood; on the contrary, it belongs to the occupier, and consequently to the sovereign in virtue of his prerogative. The same species of accession has place in the bed of a river abandoned by the stream, for it accrues to those, who possess lands near the bank of the river in proportion, that is, to the breadth of each land in the part next to the stream. But a new bed is under the same right as the river itself, that is, it is public; for the river by forming a new channel makes private land public, and public land private. And thus rivers are said to discharge

id est judicum vel principum, fungi. Judex enim vel imperator sæpe, quod unius est, alteri adjudicat, juste vel injuste, bona fide vel mala. Sed ubi flumen mihi abstulit meum prædium per alvei constitutionem, deinde redit ad antiquum alveum, de jure stricto in prædio quodam meo nihil possum vendicare; cedit enim iis, qui prope ripam prædia habent, de æquitate tamen vix obtinet hoc, id est, nullo modo obtinet. Ubi autem flumen alveum sibi non constituit in agrum meum, sed illum inundaverit, non immutatur species ejus quantum ad proprietatem.

Dig. XLI. i. § 7. Inst. II. i. § 24. Azo, p. 1065, § 35.

3. De accessione, quæ fit humana natura operante per adjunctionem specierum.

Hæc de accessione, quæ fit tantum divina natura operante. Est et alia, quæ fit tantum humana natura operante, quæ fit per adjunctionem unius speciei ad alteram, ejusdem generis vel diversi, per applumbaturam vel ferriliminationem, secundum quod infra legitur, et ibi dicitur, quæ pars alteri debet accrescere. Si autem per applumbaturam, minor cedit majori vel preciosiori; sed si neutra preciosior, quilibet suum vendicabit.

Inst. II. i. § 25. Dig. XLI. i. § 7. Azo, p. 1065, § 5.

4. De ædificiis quibuslibet.

Vendicat etiam sibi locum jus accessionis in ædificiis per humanæ naturæ laborem, ut si quis in solo suo alienam materiam ædificavit, ipse dominus intelligitur ædificii, quia omne, quod inædificatur, solo cedit. Nec tamen is, qui materiæ dominus fuerat, dominus esse desinit, nec suum potest eximere, sed pro eo duplum consequetur, et si dirutum sit ædificium, quod suum fuerit, vendicare poterit, nisi fuerit duplum consequutus. E contrario autem, si quis de suo in alieno solo ædificaverit mala fide, materiam præsumitur donasse, si au-

Dig. XLI. i. § 7. Azo, p. 1066, § 39. Inst. II. i. § 29. Dig. XLI. i. § 12. Inst. II. i. § 39.

the functions of surveyors, that is, of judges or sovereigns, for a judge or an emperor often adjudicates to one or the other justly or unjustly, in good faith or in bad faith. But where a river has taken from me my land by the formation of a channel, and afterwards returns to its ancient channel, of strict right I can claim nothing in the land formerly mine, for it accrues to those, who have lands next to the bank; but this is scarcely, or not all equitable. But where the stream has not formed a new channel in my land, but has simply overflowed it, the species of the land is not changed, as regards the property.

3. Of accession, which results from human nature operating by the adjunction of species.

Thus much concerning accession, which is made only through the operation of Divine nature. There is also another [kind of] accession, which is made only through the operation of human nature, which is effected by the adjunction of one species to another, of the same or of a different kind, by soldering with lead or welding with iron, according to what is read below, and it is there explained, which part ought to increase the other part. But if it be soldered with lead, the smaller devolves to the larger or more precious part; but if neither is more precious, each will claim his own.

4. Of certain buildings.

The right of accession claims also place in certain buildings through the labour of human nature, as if a person builds on his own ground with another man's materials, he is understood to be the owner of the building, because whatever is built upon land devolves to the land. Nevertheless, he who was the owner of the materials does not cease to be the owner, but he cannot claim his own, but he shall obtain double its value instead; and if the building shall be destroyed, he may claim what was his own, unless he has obtained the double value. And on the opposite hand, if any one has built with his own materials upon the land of another in bad faith, he is presumed to have presented him with the f. 10.

f. 10. Dig. XLI. i. § 60.

tem bona fide, solvat dominus soli precium materiæ et mercedem fabricatorum. Hoc autem, quod prædictum est, locum habet, si ædificium sit immobile, si autem mobile, aliud erit, ut ecce, horreum frumentarium novum ex tabulis ligneis factum, in prædio Semphronii positum, non erit Semphronii.

5. De literis et picturis. Dig. XLI. i. § 91, 92. Inst. II. i. §§ 33, 34. Azo, p. 1067, § 42.

Hæc eadem species accessionis, per humanæ naturæ solicitudinem, potest assignari in literis. Literæ enim, licet sint aureæ, perinde membranis chartisve cedunt, sicut ea solo cedere solent, quæ ædificantur vel inseruntur. Sed in picturis erit contrarium. Ridiculosum enim esset preciosam picturam per accessionem cedere vilissimæ tabulæ; et ideo tabula cedit picturæ, ut in Institutis plenius inveniri poterit, et in Summa Asonis,[1] quod in casu deterior est conditio possidentis. Item in eodem, quod melior est conditio possidentis, propter duplex beneficium possidendi.[2] Item in eodem, quod ubi obscura sunt utriusque jura, pro possessore judicabitur. Potest etiam eadem species assignari in texturis. Nam si alienam purpuram quis intexuerit in vestimento suo, licet preciosior sit purpura, tamen cedit vestimento jure accessionis. Item eadem species accessionis potest assignari in fructuariis et usuariis circa fructuum obventionem.

Inst. II. i. § 26. Azo, *ibid.*

6. De accessione, quæ fit divina natura et humana

Alia[3] autem accessio erit divina natura et humana cooperante, et quæritur ex ea dominium, ut ecce, Titius alienam plantam in solo suo posuit, ipsius erit planta. Et ex diverso, si Titius suam plantam in

[1] "et ibi inveniri poterit et in "summa," MSS. Rawl. and Crewe, *Asonis* being omitted.

[2] "Item in eodem, quod melior "propter duplex beneficium possi- "dendi," Rawl. and Crewe.

[3] "Similis," Rawl. and Crewe.

materials; but if in good faith, he shall pay the master of the soil the price of the materials and the wages of the workmen. This, however, as above said, takes place if the building be immovable, but if it be movable, it will be otherwise; as, for instance, a new barn for corn made of planks of wood, placed upon the land of Sempronius, shall not become the property of Sempronius.

5. Of letters and paintings.

The same species of accession through the solicitude of human nature may be assigned in letters. For letters, although they be golden, belong to the parchments and papers equally as those things, which are built upon or are inserted in the soil belong to it. But in the case of paintings the rule will be opposite; for it would be ridiculous that the most precious painting through accession should belong to the most valueless tablet, and therefore the tablet belongs to the painting, as may be fully seen in the Institutes and in the Summa of Azo, in which case the condition of the possessor is the weakest. Likewise, in the same work, because the condition of the possessor is the stronger on account of the twofold advantage of possessing. Also in the same work, because where the rights of each are obscure, judgment will be given for the possessor. The same species [of accession] may be assigned in textures; for if a person shall have interwoven the purple [thread] of another into his vesture, although the purple [thread] be more valuable, it nevertheless belongs to the vesture in right of accession. Likewise, the same species of accession may be assigned to those, who are entitled to the fruits, and to those, who are entitled to the use [of lands] with regard to the obvention of the fruits.

6. Of accession, which is the result of the co-operation of

Another kind of accession results from the co-operation of divine and human nature, and dominion is acquired from it; as, for example, Titius has set another person's plant in his own land, it will be his plant; and on the other hand, if Titius has set his own plant in the land of

co-operante et de planta. Inst. II. i. §§ 31, 32. Dig. XLI. ii. § 9.

Menii solo posuerat, Menii erit planta, si modo utroque casu radices egerit, unde versus,

" Quicquid plantatur, seritur vel inædificatur,
" Omne solo cedit, radices si tamen egit." [1]

Sed antequam radices egerit, permanet ejus, cujus prius fuerat, et hæc est adeo verum, ut si vicini arbor ita terram Titii oppresserit, ut in ejus fundo radices egerit, Titii erit arbor. Ratio enim non permittit, ut alterius sit quam ejus, in cujus fundo radices egerit. Item si in confinio arbor posita sit, et in vicini fundo radices egerit, communis erit, nec licebit vicino radices excidere. Et hoc verum est, si arbor mea in vicini fundo radices egerit, sine quibus vivere non possit, quod communis esse debeat, si autem satis vivere possit sine radicibus illis, non erit communis. Qua autem ratione plantæ solo cedunt, cum radices egerint, et ædificia immobilia, eadem ratione cedunt frumenta, cum sata fuerint et solo coaluerint, sive fortuito casu ceciderint in terram, sive non.

Cap. III.

1. De modo acquirendi per specificationem. Dig. XLI. i. §§ 1, 7. Inst. II. i. § 25.

Acquiritur et nobis res per specificationem, ut si quis de aliena materia speciem fecerit aliquam, dominus erit speciei, qui fecit.

2. Item per confusionem. Azo, p. 1068, § 58.

Est et alius modus acquirendi per confusionem. Confunduntur itaque liquida, ut mel et vinum. Confunduntur etiam solida, licet cum difficultate magna, videlicet species, sicut aurum et argentum, plumbum et ferrum, et quod ex iis redigitur erit commune (sive

[1] " unde versus," down to " tamen " egit," not in the text of MS. Rawl. nor of MS. Crewe, but they are added in the margin of MS. Rawl.

Menius, it will be the plant of Menius; provided only in each case it has struck root, whence the verses: divine and of human nature, and of plants.

"Whatever is planted, sown, or built in,
"Belongs to the soil, if root it has struck."

But before it has struck root, it remains the property of him, whose it was before; and this is so true, that if the tree of a neighbour shall have so pressed upon the land of Titius as to have struck its roots into his ground, the tree shall belong to Titius; for reason does not allow a tree to belong to any one else, than to him in whose land it has struck root. Likewise, if a tree has been planted on border ground, and shall strike its roots into a neighbour's land, it will be common property, nor will the neighbour be allowed to cut off its roots. And this is true, if any tree has struck roots into a neighbour's land, without which [roots] it cannot live, that it should be common [property]; but if it can live sufficiently well without those roots, it will not be common property. But in the way in which plants belong to the soil, when they have struck root, and buildings [which are] immoveable, in the same way the corn which has been sown and has grown up in the soil belong to it, whether it has fallen upon the ground by chance or not.

Chapter III.

A thing is also acquired by us thorough specification, as if a person shall have made some particular species out of materials belonging to another, he who has made it will be the owner of the species. 1. Of the manner of acquiring by specification.

There is also another manner of acquiring by confusion. Thus liquids are confused, as honey and wine. Solids also are confused, but with greater difficulty, as being species, [such] as silver and gold, lead and iron, and what results from them, whether it can be separated 2. Likewise by confusion.

Inst. II. i. § 27. Dig. XLI. i. §§ 7, 8, 9. Inst. *ib.* § 25.

separari possit sive non) inter eos, de quorum voluntatibus corpora sive species confunduntur; si autem casu fortuito fiat confusio et separari non possunt, idem erit. Si autem separari possunt materiæ, unusquisque partem ponderis et mensuræ habebit, quam habuit in rudi materia. Si autem frumentum alicujus mixtum

f. 10 b.

fuerit cum frumento alterius, non erit frumentum inter eos commune, sed quilibet de acervo suo vendicabit partem, pro modo sui frumenti. Nec fieri poterit communicatio frumenti, quia singula corpora manent in sua substantia, ac si pecora Ticii tuis pecoribus essent mixta, et ubi non intelligitur quod grex sit communis,

Inst. II. i. § 28.

et quamvis valde difficile sit et quasi impossibile separare frumentum meum a frumento tuo, satis tamen dici poterit pro parte indivisa dari vendicationem, quasi acervus frumenti sit communis, ut vendicet tantum de acervo quantum fuerat suum, et differt confusio a mixtione in tribus; species enim dicuntur misceri, et materiæ confundi. Item species mixtæ remanent in eadem substantia et specie, confusæ autem transferuntur in aliam materiam.

4. Item per inventionem. Dig. XLI. i. § 31.

Acquiritur et dominium per inventionem, ut si thesaurus inveniatur; secundum quod dicetur inferius inter placita coronæ.

Cap. IV.

1. De diversis modis acquirendi ex jure civili. Dig. XLI. i. §§ 40, 41. Britton, l. ii. ch. iii. § 13. Fleta, 177.

Acquiritur etiam jure civili multis modis, videlicet ex causa donationis, ex causa successionis, ex causa testamentaria, et aliis pluribus modis, secundum quod inferius dicetur. Acquiritur etiam res corporalis per traditionem, quia res corporalis patitur traditionem, quod non faciunt res incorporales, ut sunt jura. Et quid sit

or not, will be common between those by whose consent the bodies or species are confused, but if the confusion has taken place fortuitously, and they can not be separated, the same result will follow. But if the [several] matters can be separated, each person will have his part of the weight and measure, which he had in the rude matter. But if the corn of one man shall have been confused with the corn of another, the corn will not be f. 10 b.
common, but each will claim from the heap his part in proportion to his own corn. Nor can there be any community in the corn, because the single corpuscles remain in their own substance, just as if the sheep of Titius have been confused with your sheep, and where it is not understood that the flock is common, and although it may be very difficult, and as it were impossible to separate my corn from your corn, it will be sufficient to say, that a claim is allowed for the undivided part, as if the heaps of corn was common, that each may claim so much from the heap as was his own, and confusion differs from mixing together in three respects: for species are said to be mixed and matters to be confused. Also mixed species remain the same substance and species, but things confused are transformed into other matter.

Ownership is also acquired by discovery, as for instance, if a treasure be discovered, according as it will be explained below amongst the Pleas of the Crown. 3. Also by discovery.

Chapter IV.

A thing is acquired by the civil law in various manners; viz., by way of donation, by way of succession, by way of testament, and in several other ways, as will be explained below. A corporeal thing is also acquired by delivery, for a corporeal thing admits of delivery, which incorporeal things do not, such as rights. And what is 1. Of the different manners of acquiring by the civil law.

traditio et quæ sufficiunt pro traditione, dicetur infra plenius, de donationibus.

2. De quadam recapitulatione de quadam divisione rerum. Dig. I. i. § i. Azo, p. 1072, § 1.

Est et alia divisio rerum, de qua superius dicitur in parte, quod aliæ sunt corporales, aliæ sunt incorporales. Corporales sunt hæ, quæ sui natura tangi possunt, qualia sunt homo, fundus, vestis, aurum, argentum, et aliæ res innumerabiles, quæ omnes numerari non possunt, propter earum multitudinem, et ideo dicitur natura sui, licet res tangi non possunt, propter casum forte, quia res cecidit in profundum maris, vel propter difficultatem, sicut stellæ cœlo infixæ, quæ res corporales sunt, licet tangi non possunt prædictis rationibus, tamen tangibilia sunt. Item corporales res sunt fumus et aer. Est enim aer unum ex quatuor elementis, ex quibus omnia corpora constant et creantur. Illud idem etiam est, quod assumitur et remittitur a corpore, sicut flatus et anhelitus. Incorporales vero res sunt, quæ tangi non possunt, qualia sunt ea, quæ in jure consistunt, sicut hæreditas, usus fructus, advocationes ecclesiarum, obligationes, et actiones, et hujusmodi. Nec obstat quod in hæreditate, usu fructu, et hujusmodi, corporales res contineantur: nam quod ex aliqua obligatione nobis debetur, plerumque corporale est, veluti homo, fundus, pecunia, et hujusmodi, sed ipsum jus hæreditatis, id est, ipsum jus, quod est hæreditas, incorporale est. Et ita dicendum est de jure utendi, fruendi, et jure advocationis et obligationis, et etiam de jure rusticorum prædiorum. Incorporales etiam res sunt, licet in jure non consistant, sicut sunt genera et species, calodæmones et cacodæmones, anima mundi et animæ hominum.

Azo, p. 1072, § 3.

delivery, and what [acts] are sufficient [to constitute acquisition] by delivery will be explained more fully [in treating] concerning donations.

2. Of a certain recapitulation respecting a certain division of things.

There is also another division of things, respecting which we have spoken above in part, namely, that some are corporeal, and others are incorporeal. Corporeal are those things, which, by their nature, may be touched, such as a man, a ground, a robe, gold, silver, and other innumerable things, all of which cannot be enumerated on account of their multitude, and [the phrase] by their nature is used, although the things themselves may not be able to be touched, from an accident perhaps, because a thing has fallen into the depth of the sea, or from a difficulty, as the stars fixed in the firmament, which are corporeal things, [and] although they cannot be touched for the aforesaid reasons, nevertheless they are susceptible of touch. Likewise, smoke and air are corporeal. For air is one of the four elements, of which all bodies consist and are created. For it is that, which is inhaled and expired from the body, as wind and breath. But those things are incorporeal, which cannot be touched, such as those which consist in right, as an inheritance, an usufruct, the advowsons of churches, obligations, and actions and such like. Nor is it any objection, that corporeal things are contained in an inheritance, in an usufruct, and in such like, for whatever is owing to us from an obligation, is for the most part corporeal, as a person, a ground, money, and such like, but the right of inheritance, that is, the right itself, which is the inheritance, is incorporeal. And so it must be said respecting the right of using and of enjoying the fruits and the right of advowson, and of obligation, and likewise the right of rural lands. Things also are incorporeal, although they do not consist of right, as are genera and species, good spirits and evil spirits, the soul of the world and the souls of men.

3. De servitutibus. Dig. I. 8, § 1. Inst. II. ii. § 2.

Quia vero servitutes connumerantur inter alias res incorporales, videndum est de servitutibus. Est enim quædam servitus qua homo fit servus hominis, sed de ea non tractatur hic, sed de illa qua subjicitur prædium prædio, sed fit tamen ad similitudinem ejus, qua homo fit servus hominis, ut sicut illa constitutio dicitur jus gentium, quasi quis dominio alieno contra naturam subjicitur. Et hoc idem dicatur de servitute, sive de constitutione qua domus domui, et rus ruri subjungitur, et ita dicuntur servitutes urbanæ et rusticæ. Et quæ istæ sunt, et quis eas constituat, et cui, et qualiter, et cum constituantur, et qualiter amittuntur, inferius dicetur.

f. 11.

Inst. II. i. § 3.

Cap. V.

1. De acquirendo rerum dominio ex causa donationis inter vivos.

Quoniam inter alias causas acquisitionis, magna, celebris, et famosa est causa donationis, ideo donatio sibi vendicat secundum locum; quia per eam magis acquiritur et sæpius quam per aliam, et unde imprimis videndum est, quid sit donatio et qualiter dividatur, quis donare possit, et quis non. Item quæ res possit donari, et quæ non, et cui dari possit, et cui non. Item quæ exigantur ad hoc, quod valeat donatio. Item qualiter acquiratur possessio, et qualiter transferatur ab uno ad alium, et cum fuerit acquisita, qualiter amittatur, et cum amissa fuerit, qualiter restituatur.

2. Quid sit donatio. Azo, l. viii.

Est autem donatio quædam institutio, quæ ex mera liberalitate et voluntate, nullo jure cogente, procedit, ut rem transferat ad alium, et est (dare) rem accipien-

3. Of servitudes.

Further, because servitudes are numbered amongst other incorporeal things, let us speak of servitudes. For there is a certain servitude in respect of a man being the serf of another man, but we are not treating here of that [special] servitude, but of that, under which land is subject to other land, but it is constituted after the likeness of that, under which a man is the serf of another man, so that, as that institution is said to be under the right of nations, as if a person is subject to another contrary to nature, the same thing is likewise said of a servitude or of the constitution, under which one is f. 11. subject to another, and one land to another land, and so servitudes are called urban and rural. And what they are, and who institutes them, and to whom and in what manner, and when they are instituted, and in what manner they are lost, will be explained below.

Chapter V.

1. Of acquiring the dominion over things, because of a donation between the living.

Since amongst other causes of acquisition, the cause of donation is great, celebrated, and famous; donation accordingly claims for itself the second place, because acquisition is made to a greater extent and more frequently through it, than through any other [cause], wherefore we must see in the first place what is donation, and in what manner it is divided, who may make donation, and who not. Likewise, what things may be the subject of donation, and what not; and to whom things may be given, and to whom not. Likewise, what is required, in order that a donation should be valid. Likewise, in what manner possession is obtained, and in what manner it is transferred from one person to another, and when it shall have been acquired, in what manner it is lost, and when it has been lost, in what manner it is restored.

2. What is donation.

But donation is a kind of purpose, which, from mere liberality and [good]will under no compulsion of right, proceeds to transfer a thing to another, and [to give] is

de Donat. Britton, l. ii. ch. iii. § 1. Fleta, 177.

tis facere cum effectu, alioquin inutilis erit donatio, quæ irritari poterit et revocari; ut si fiat de re aliena, quia non videtur quis possessionem adeptus, qui eam ita nactus est, ut illam retinere non possit, et tamen si res aliena donetur, erit donatio valida quoad dantem et quoad accipientem ab initio, licet invalida sit quantum ad verum dominum et illum qui jus habet, erga quem nullo tempore erit valida, nisi per confirmationem ejus, qui illam infirmare poterit, scilicet veri domini vel ejus hæredis, vel per eorum ratificationem vel ratihabitionem, vel per cursum temporis, quod omnium excludit actionem.

3. Qualiter dividitur donatio. Inst. II. vii. § 2. Dig. XXXIX. 5. § 1.

Videndum erit, qualiter dividitur donatio; dividitur sic, quod donationum alia inter vivos, alia mortis causa, sicut ex causa testamentaria, de qua inferius dicetur. Item donationum alia simplex et pura, scilicet quæ nullo jure civili vel naturali cogente, nullo precio, metu vel vi interveniente, ex mera et gratuita liberalitate donantis procedit; et ubi in nullo casu velit donator ad se reverti, quod dedit vel quod se daturum promisit, sive fiat donatio pure sive in diem, nisi fiat sub conditione vel sub modo. Item alia fit ob causam, ubi, scilicet, causa interponitur ut aliquid fiat vel non fiat, in quam speciem cadit donatio causa dotis, vel mortis, vel hujusmodi, ut, si quis ea mente dederit, ut tunc demum fiat accipientis, cum aliquid fuerit subsequutum, id est, si aliquid factum fuerit vel non factum. Et hoc genus donationis improprie dicitur donatio, cum fiat sub

Britton, l. ii. ch. iii. § 9. Fleta, 178.

to make a thing [the property] of another effectively, otherwise a donation, which could be rendered invalid and be recalled, would be useless; as, if a donation be made of another person's property, because he who has so obtained it, that he may not keep it, does not appear to have gained possession of it, and yet if a donation be made of another person's property, the donation will be valid, as regards the giver, and as regards the receiver from the commencement, although it may be invalid as regards the true owner and him who has right [over it], against whom the donation will never be valid, except by the confirmation of it by him, who may invalidate it, namely, the true owner, or his heir, or by their ratification or ratihabitation of it, or by course of time, which excludes the action of all parties.

3. In what modes donation is divided.

We must see in what modes donation is divided; it is divided thus, that some donations are made between the living, others by reason of death, as by means of a testament, respecting which we shall speak below. Likewise, one class of donations are simple and absolute; for instance, such as proceed under no compulsion of civil or of natural law, under no intervention of money, fear, or violence, from the mere and gratuitous liberality of the donor, and where in no case the donor wishes, that what he has given or has promised to give, should return to him, whether the donation is made absolutely or for a future day, unless it be made conditionally and in a modified form. Likewise, another kind of donation is made for a cause, where, for instance, a cause is interposed, that a thing should be done or not done, under which species donations rank, which are made with the object of dowry, or in view of death, or in like manner as, if a person shall give a thing with such an intention, that it shall then at length become the property of the receiver, when something shall have happened subsequently, that is, if something shall have been done or not done. And this kind of donation is improperly called donation, since

conditione, et si quid detur ea mente, ut statim fiat accipientis, si tamen aliquid factum sit vel non factum, quod id ad se debet reverti,[1] velit donator, nec hoc proprie dicitur donatio, sed talis, videlicet, quæ resolvitur sub conditione, secundum quod plenius dicetur inferius, de donationibus conditionalibus. Qualis autem debet esse, dicetur infra in titulo, qui loquitur de illis, quæ exigantur ad hæc, quod valeat donatio. Item donationum quædam justa et quædam injuriosa. Justa autem
f. 11 b. poterit esse, si fiat de re propria, si autem fiat de re aliena, erit injuriosa, et ea a vero domino poterit revocari. Item donationum, quædam libera et pura, et quædam sub conditione vel sub modo suspensa. Item quædam absoluta et larga, et quædam stricta et coarctata, sicut certis hæredibus, quibusdam vero a successione exclusis, ut si fiat donatio certis hæredibus et personis, vel si ab initio larga fuerit et fuerit postmodum ex conventione coarctata, ita quod donatorius rem sibi datam dare vel vendere non possit certis personis, vel non nisi certis personis, quod quidem facere poterit quilibet, nisi ubi pactum intervenerit in initio donationis, quod hoc ei facere non liceat contra pactum. Item donationum alia incepta et non perfecta, ut si de donatione convenerint, et instrumentum inde confectum fuerit et homagium captum, tamen non sufficiunt hæc omnia, nisi traditio subsequatur. Item poterit donatio esse simplex præloquutio, quæ non sufficit pro donatione. Item poterit fieri donatio cum charta vel sine charta, quia licet charta non intervenerit, valida pote-

[1] "id ad se reverti," "quod" and "debet" being omitted, is the reading of MSS. Rawl. and Crewe, which also omit "velit donator."

it is made under a condition, and if a thing be given with the intention that it shall immediately be the property of the receiver, whilst the donor wishes, nevertheless, that something be done or not done, it shall revert to him, this is not properly called a donation, but [only so] and in a qualified sense, namely, as being terminable under conditions, as will be more fully explained below, under the head of conditional donations. But how it ought to be qualified will be explained under the title, which speaks of what things are required for the purpose of making a donation valid. Likewise, some donations are rightful and some are wrongful. But a donation may be rightful, if it is made of one's own property, but if it is made of another person's property, it is wrongful, f. 11 b. and it may be revoked by the true owner. Likewise of donations, some are free and absolute, and some [are] under conditions and under a mode. Likewise, some are absolute and large, and others restricted and narrowed, as to certain heirs, some, however, being excluded from the inheritance, as if a donation should be made to certain heirs and persons, or if it has been originally large and has been subsequently narrowed by a compact, so that it is not allowable for the donor to give or to sell to certain persons a thing, which has been given to himself, or only to certain persons, which every person may do, except where a compact has intervened at the commencement of the donation, that it shall not be lawful for him to do this thing contrary to the compact. Also of donations, some are incepted, but not completed, as if they have agreed about the donation, and an instrument of it has been thereupon completed, and homage accepted, nevertheless all these things do not suffice, unless delivery has taken place. Likewise, a donation may be a simple prælocution, which, however, is not sufficient to constitute donation. Also, a donation may be made with a charter or without a charter, for although no charter has intervened, the donation may be

rit esse donatio, dum tamen donatio probari possit aliis legittimis documentis, unde non sufficit tantum probare chartam, nisi probetur et donatio. Sed e converso, poterit charta esse vera et valida per se, licet donatio fuerit imperfecta, et e contrario. Item donationum quædam valida esse possunt ab initio, et invalida fieri ex post facto, et e converso. Item valida poterit esse donatio statim ab initio inter quasdam personas, et invalida et suspensa quantum ad alias personas, ut si quis rem alienam dederit alicui, ut supra dictum est. Item donationum quædam ab initio tam valida, tam perfecta, quod irritari non poterunt, nec revocari. Item est et alia, quæ ab initio est aliqua et incepta, sed tamen non perfecta, et per confirmationem perficitur et convalescit, ut supra dictum est: ut si incepta fuerit, sed traditio in vita donatoris non subsequuta, per confirmationem veri hæredis post mortem antecessoris, cum ei jus descenderit, et non ante, valida efficitur et confirmatur, quia confirmatio omnem supplet defectum. Item ab initio poterit esse perfecta, et tamen in pendenti erit donatio, donec per ratificationem confirmetur, ut si minor, dum fuerit infra ætatem, donationem fecerit, in pendenti erit donatio, quousque factus major per ratihabitionem illam confirmaverit, vel per integram restitutionem illam revocaverit, et in multis aliis casibus.

Britton, l. ii. ch. iii. § 10.

4. Quis donare possit. Britton, l. ii. ch. iii. Fleta, 178.

Item videndum, quis donare possit, et quis non: et sciendum, quod donare potest omnis, qui a lege vel jure non prohibetur. Donationem vero facere potest, qui est major et plenæ ætatis, de quocunque tenemento, dum tamen sit sanæ mentis, et in seysina, et rerum suarum habuerit administrationem. Item dominus rei,

valid, provided the donation can be proved by other legal documents, wherefore it is often not sufficient to prove the charter, unless the donation is also proved. But conversely, the charter may be true and valid of itself, although the donation itself may be imperfect, and the contrary. Also of donations, some may be valid from the commencement, and may become invalid from subsequent circumstances, and the converse. Likewise, a donation may be valid immediately between certain persons, and invalid and suspended as regards other persons, as if a person shall give to some one another person's property, as has been said above. Also of donations, some are from the commencement so valid and so perfect, that they cannot be invalidated or revoked. Likewise, there is another kind, which from the commencement is something and is incepted, but nevertheless is not complete, and by confirmation it is completed and is made valid, as has been said above; as if it has been incepted, but delivery has not followed during the life of the donor, it is made valid and is confirmed by the confirmation of the true heir after the death of his ancestor, when the right has descended to him and not before, because confirmation supplies every defect. Likewise, a donation may be complete from the commencement, and yet it may be suspended, until it is confirmed by ratification, as if a minor shall have made a donation, when he is under age, the donation will be suspended until having come to majority, he has confirmed it by ratification, or shall have recalled it by an entire restitution, and in many other cases.

4. Who can make a donation.

Likewise, it is to be seen, who can make a donation and who not, and it is to be known, that every one can make a donation, who is not prohibited by law or of right. A person, indeed, may make a donation of any tenement, who is a major and of full age, provided he be of sound mind; and in seysine [of it], and has the administration of his own affairs. Likewise, the owner

et non dominus, senex, et valitudinarius, masculus, et fœmina, liber et servus aliquando. Item legittimus, et bastardus in suo casu, cum hæredes de corpore suo habuerit vel assignatos. Item tam ille, qui habet liberum tenementum, sicut ad vitam suam, quam ille, qui proprietatem habet et feodum. Item licet liberum tenementum non habuerit, donationem potest facere quis, dum tamen in seysina fuerit aliqua justa de causa, sicut ad terminum annorum, vel ratione custodiæ. Idem erit si nullam justam causam habuerit, ut si per intrusionem, vel disseysinam, et cum sit in seysina, aliis donare poterit, licet non cum effectu, et aliis per donationem facere liberum tenementum, quod quidem ipse non habuerit. Item convalescit donatio facta a
f. 12. furioso, sicut a minore, si sanæ mentis effectus, donum illud confirmaverit, vel ratum habuerit. Item donationem facere poterit ex consuetudine speciali ille, qui est infra ætatem xxi. in anno ætatis suæ xvi., sicut in villa de Gipwico, quia ibi potest facere donationem ille qui est xvi. annorum.[1]

5. Quis donare non possit. Britton, l. ii. ch. iii. § 7. Fleta, 178.

Item quis donationem facere non possit, videndum est. Et sciendum quod prohibentur donationem facere omnes, qui generalem et liberam rerum suarum non habent administrationem, sicut illi minores, qui sunt sub tutela vel cura, et se ipsos regere non norunt, accipere autem poterunt (tutore authore) et conditionem suam meliorem facere. Dare autem non poterunt, nec conditionem suam deteriorare. Dare autem ideo non possunt, quia donationi consentire non poterunt, nec cum authoritate tutoris, nec sine. Item nec surdus, qui omnino non audit. Secus autem, si tarde audit,

[1] This is the reading of the oldest MSS., namely, Rawl. and Crewe, but it is at variance with the Domesday of Ipswich, § xxx.

and the non-owner, an old man, an invalid, a male and a female, a free man, and sometimes a serf. Likewise, a legitimate child, and a bastard in his own case, when he has heirs of his body or assigns. Likewise, as will the person, who has a free tenement for his own life, as he, who has the property and the fee. Likewise, although he may not have a free tenement, a person may make a donation, provided he be in seysine [of the tenement] from some just cause, as for a term of years, or by reason of wardship. The same thing will happen, if he has no just cause, as if he be in seysine by virtue of intrusion or of disseysine, he may make a donation to others, whilst he is in seysine, although not with effect, and may make it by donation to others a free tenement, which he himself did not possess. Likewise, a donation made by a madman, as in the case of a minor, becomes valid, if f. 12.
when he is again of sound mind, he has confirmed or ratified the gift. Likewise, a person may make a donation of special custom, who is under twenty-one years of age and is in his sixteenth year, as in the ville of Ipswich, because he who is of sixteen years of age may there make a donation.[1]

5. Who cannot make a donation.

Likewise, we must see who cannot make a donation. And it is to be known, that all persons are prohibited to make a donation, who have not a general and free administration of their own affairs, as those minors, who are under guardianship or curatorship, and who do not know how to regulate themselves, but they may receive (under the authority of a guardian) and may make their own condition better. But they cannot give away, nor make their own condition worse. And for this reason they cannot give away, because they cannot consent to a donation, neither with nor without the authority of a guardian. Likewise, neither a deaf man, who cannot hear at all. It

[1] Fourteen years is stated in the Domesday of Ipswich, § xxx., to be the age of majority of the town. The Black Book of the Admiralty, Rolls Series. Appendix, Vol. II., p. 160.

quia tunc potest dare. De muto autem, qui omnino loqui non potest, id idem erit dicendum, possunt enim consentire (secundum quosdam) per signa et nutum. Et generaliter tenendum est, quod mutus donationem facere non potest, quia donationi consentire non potest, sicut nec furiosus, nec mente captus, nisi lucidis gaudeat intervallis, sicut ille qui est infra ætatem, vice autem minoris fungitur ecclesia Dei.[1] Item nec ille donare potest, qui ab hostibus captus est, quamdiu fuerit in custodia eorum et sub potestate, quia nec possidere potest, qui ab aliis possidetur, nec aliquid dare potest cum effectu, quia nihil possidet. Idem dici possit de servo ratione prædicta, quia nihil dare potest cum effectu, quia nihil possidet, dum ab aliis possidetur. In pendenti autem sunt hujusmodi donationes (secundum quosdam) donec confirmentur vel penitus infirmentur, quamvis dicant quidam, quod nulla præterita nec præsentia remaneant in suspenso, secundum quod inferius plenius dicetur de hac materia in tractatu, quæ donationes validæ sunt ab initio et quæ validæ efficiuntur ex post facto. Item donare non potest leprosus extra communionem gentium positus, (ut de termino Sancti Michaelis anno regis Henrici septimo incipiente octavo, circa finem rotuli,) sicut nec petere. Item sunt nonnulli qui dare non possunt sine consensu aliorum, nec valet illorum donatio per se, ut si archiepiscopi donationem facerent, episcopi, abbates vel priores ecclesiarum quæ sunt de advocatione domini regis, nec dare possunt sine assensu capituli sui, nec ipsum capitulum sine consensu regis vel alterius patroni, quia omnium illorum consensus, quos res tangit,

Britton, l. ii. ch. iii. § 7.
Fleta, 178.

[1] "et generaliter . . . . ecclesia "Dei," omitted in MSS. Rawl. and Crewe; "et generaliter tenendum "est quod nullus donationem facere "potest, qui donationem consen- "tire non possit, sicut nec furiosus "nec mente captus nisi gaudeant "dilucidis intervallis, vel sicut ille "qui est infra ætatem, vice autem "minoris utitur ecclesia," Gal. "et regulariter tenendum est quod "nullus donationem facere possit "qui donationi consentire non pos- "sit, sicut nec furiosus nec mente "captus nisi gaudeat de lucidis in- "tervallis, vel sicut ille qui est "infra ætatem, vice enim minoris "utitur ecclesia," Glas.

is otherwise, however, if he is slow of hearing, because he may then give. Of a dumb person also, who cannot speak at all, the same thing may be said, for they may agree (according to some) by signs and by a nod. And it is to be held generally that a dumb person cannot make a donation, because he cannot consent to a donation, as neither a madman can, nor an imbecile, unless he has lucid intervals, just as a person who is under age, the Church of God also fills the place of a minor. Likewise, he cannot make a donation who has been captured by the enemy, as long as he shall be in their custody and under their power, for he, who is in the possession of others, cannot possess, nor can he give anything with effect, as he does not possess anything. The same may be said of a serf for the aforesaid reason, for he can give nothing with effect, for he possesses nothing whilst he is in the possession of others. But such donations remain in a state of suspense (according to some) until they are confirmed or altogether abrogated, although some say, that nothing past or present remains in suspense, according as shall be more fully explained below on this subject, in treating what donations are valid from the commencement, and what from subsequent circumstances. Likewise, a leprous person, who is placed out of the communion of mankind, cannot give (as in the term of St. Michael in the seventh year of King Henry at the commencement of the eighth, about the end of the roll), as he cannot ask. Likewise, there are some who cannot without the consent of others, nor is their donation valid of itself, as if archbishops should make donations [or] bishops, or abbots or priors of churches which are advowsons of the lord the king, neither can they give without the consent of their chapter, nor [can] the chapter itself without the consent of the king or another patron, for the consent of all those persons, whom the

Britton, l. ii. ch. iii. § 4. Fleta, 178.

erit necessarius et requirendus. Idem dicendum erit in rectoribus ecclesiarum, qui nihil possident nisi nomine ecclesiæ suæ, unde nihil dare possunt, alienare vel permutare, nisi de consensu episcopi vel patroni, nisi inde melioretur conditio ecclesiæ, si autem deterioretur, non valet, quia fit eis donatio secundario, sicut maxime patet in ipsa dedicatione et etiam post dedicationem: "Do Deo et ecclesiæ tali et canonicis vel mona-" chis vel rectoribus vel personis ibidem Deo servien-" tibus," et ita quod primo et principaliter fit donatio Deo et ecclesiæ, et secundario canonicis vel monachis vel personis, et ita nihil habent nisi nomine ecclesiæ suæ, et hæc vera sunt, nisi velit aliquis dicere, quod ecclesiæ suæ conditionem meliorare non possunt, etiam sine consensu prædictorum. Sunt etiam quidam priores et procuratores, qui sunt amotibiles, qui nec dare possunt nec alienare, sicut nec rem in judicium deducere, nec permutare, nec cum consensu superioris, nec sine consensu abbatis vel prioris, vel alterius talis, quia amotibiles sunt et non perpetui, nec generalem nec liberam habent administrationem. Sunt tamen quidam, qui sunt amotibiles, qui respondere poterunt et rem in judicium deducere in locis spiritualibus, sicut apud Sanctum Albanum. Item donare non potest bastardus cum effectu, nisi de corpore suo hæredes procreatos habuerit, vel assignatos fecerit legittime, vel per nomen[1] vel per modum donationis. Item dare non potest cum effectu accusatus super crimine læsæ majestatis, vel alio crimine capitali post feloniam perpetratam, dum tamen condemnatus fuerit judicialiter et per sententiam, sed donatio talis remanebit in pendenti, donec fuerit condemnatus vel convictus. Et ad hoc facit lex F. de

f. 12 b.

Britton, l. ii. ch. iii. § 5.

[1] "vel per nomen" omitted in MSS. Rawl., Crewe, Gal., and Glas.

thing concerns, will be necessary, and is to be required. The same is to be said as regards the rectors of churches, who possess nothing except in the name of their church, whence they can give nothing, nor alienate, nor exchange, except with the consent of the Bishop or of the patron, unless thereby the condition of the church is ameliorated, but if it be deteriorated, it is invalid, for the donation is made to them in a secondary sense, as is most clear in the very dedication and after the dedication, " I give to God and to such a church, and to " the canons or monks or rectors or persons serving God " therein, and so on," because the donation is made in a primary sense and principally to God and to the Church, and in a secondary sense to the canons or monks or parsons, and so he has nothing except in the name of his church ; and these things are true, unless someone wishes to say that they cannot ameliorate the condition of their church even without the consent of the aforesaid. There are also some priors and procurators, who are removeable, who cannot give nor alienate anything, as neither can they bring anything into court, nor exchange it, neither with the consent of their superior nor with the consent of the Abbot or Prior, or of any other such person, because they are removeable and not perpetual, nor have they a general and free administration. There are, however, some who are removeable, who may f. 12 b. answer and carry a question into court in spiritual places, as at St. Alban's. Likewise, a bastard cannot give with effect, unless he has heirs procreated of his body, or has made assigns legitimately or by name, or by way of donation. Likewise, a person accused of the crime of high treason, or of any other capital crime, cannot give with effect after the felony has been perpetrated, until he has been condemned judicially and by sentence, but such a donation remains in suspense, until he shall have been condemned or convicted ; and this is supported by the Law, " Post contractum maleficium,"

Dig. XXXIX. v. 15.

donationibus post contractum maleficium, etc., ubi dicitur, quod post contractum crimen donationes factæ valent, nisi condemnatio sequuta sit, innuit ergo quod nisi fuerit subsequuta, quod valent donationes, et si fuerit, quod non valent. Item dare non potest ille, qui omnino seysinam non habuerit rei datæ, licet dominium habuerit et servitium percipiat, sicut videri poterit in casu. Esto, quod quis primo dimiserit terram suam ad firmam B. et postea illam dederit C. et homagium suum ceperit, et in seysinam posuerit, salvo B. firmario termino suo, et quod nihil ei deperiat per donationem illam, et ita quod nihil remaneat illi donatori nisi homagium et servitium. Item esto, quod idem donator, qui nihil sibi retinuit nisi dominium et servitium sine seysina, eandem terram dederit eidem B. firmario, et de facto posuerit ipsum in seysinam, si ipse C. incontinenti ipsum B. ejecerit, B. per assisam non recuperabit ut liberum tenementum, nec ut terminum; quia utrumque amittit, ex quo donator nullam omnino seysinam habuit, ex tali donatione non potuit ei facere liberum tenementum, et ex quo idem B. se tenuit ad feoffamentum, tacite termino renunciavit. Sed si idem C. post feoffamentum eundem firmarium ejicere non possit incontinenti, vel post intervallum, competit ei assisa novæ disseisinæ, tam super feoffatorem suum, quam super firmarium, in quo casu tantum per assisam recuperabit versus ipsum B. firmarium. De æquitate tamen per officium justiciariorum tenebitur donator eidem firmario ad excambium propter fraudem. Et plus de hac materia infra, si diversis temporibus ab uno et eodem facta fuerit donatio duobus. Item non valent donationes factæ inter virum et uxorem, non enim poterit vir

Dig. XXIV. i. 1. Britton, l. ii. ch. iii. § 6. Fleta, 178.

in the Digest "de donationibus, &c.," where it is said, donations made after crime has been committed are valid, unless condemnation has followed; it implies, therefore, that unless it follows, the donations are valid, and if it follows, they are not valid. Likewise, a person cannot give who has no seysine whatever of the thing given, although he may have the dominion over it, and may derive a service from it, as may be seen in the [following] case. Let it be, that a person has first let his land to farm to B., and has afterwards given it to C., and received homage from C., and has placed him in seysine of it, there being reserved to the farmer B. his term, and that he should lose nothing by the donation, and so that nothing remains to the donor but homage and service. Likewise let it be, that the same donor, who has retained nothing for himself but the dominion and service without seysine, has given the same land to the same farmer B., and has in fact placed him in seysine, if C. himself has forthwith ejected B. himself, B. cannot recover it by the assise as a free tenement, nor as a term, for he loses both; from the fact that the donor had no seysine, he could not make it a free tenement for him, and from the fact that B. has accepted an enfeofment, he has tacitly renounced his term. But if C. after the enfeofment cannot eject the same farmer forthwith, nor after an interval, he may have an assise of novel disseisine as well against his own feoffor, as against the farmer, in which he will only recover by the assise against the farmer B himself. But by Equity the donor will be bound, through the office of the justiciaries, to make compensation[1] to the farmer, on the grounds of fraud. And more on this subject below, if a donation has been made to two persons by one and the same person at different times. Likewise, donations made between a husband and wife are not valid, for a hus-

[1] Equity is referred to below, fol. 23 b.

dare uxori, nec e converso, constante matrimonio, quia hujusmodi donationes prohibitæ sunt inter tales personas, nec enim fraudem facere possunt Constitutioni,[1] ut si vir donationem fecerit extraneæ personæ, ea mente ut extranea persona eam det uxori in vita viri, vel post mortem. Et quod de viro dicitur, dici potest de uxore. Si autem ante sponsalia vel matrimonium vel post divortium fiant, bene valent, dum tamen non fiant in occasione matrimonii subsequentis, si fiant ante, secundum quosdam.[2]

6. Cui donari possit.

Dictum est in proximo præcedente, quis donare possit et quis non, nunc autem dicendum cui donari possit, et sciendum est quod dari potest tam servo quam libero, sive fiat donatio a domino sive non domino, secundum quod inferius dicetur. Item tam fœminæ quam masculo. Item tam viro, quam uxori, simul vel separatim per se. Item tam minori, quam majori, dum tamen tutoris authoritas intervenerit, sed non poterit quis esse minoris feoffator et tutor, quia cum sit donator, non poterit se ipsum dare tutorem, quia sic videretur continuare seysinam suam, licet omnes fructus f. 13. et proventus rei datæ converteret in usus et utilitatem minoris. Oportet enim in qualibet donatione, quod dator se ponat extra seysinam, tam animo, quam corpore, corpore tam proprio, quam alieno. Oportet quod donatorius se ponat in seysinam tam animo, quam corpore, corpore proprio vel alieno. Item donari poterit tam bastardo, quam legittimo, sibi et hæredibus suis, vel assignatis suis. Item fieri poterit donatio tam pluribus, quam uni soli, simul et semel, vel successive per

[1] The word "constitutio," as used here and in fol. 29, may signify the so-called "dotis constitutio," like the modern word "settlement," or it may refer to the Constitution of the Emperor Justinian, "Sancimus, &c.," which was received as Law in England, see below, fol. 29 b.

[2] "aliud erit secundum quosdam," MS. Crewe. MS. Rawl. agrees with the text.

band cannot give to his wife, nor the converse, during matrimony, for such gifts are prohibited between such persons; nor can they work a fraud against the Constitution, as if a man should make a donation to a strange person with the intention, that the strange person should give it to his wife during the lifetime of the man or after his death, and what is said of the man, may also be said of the wife. But if [the gifts] are made before espousals, or before matrimony, or after divorce, they are good and valid, provided they are not made on the occasion of a subsequent marriage, [but] if they are made before, according to some [they are valid].

6. To whom a donation may be made.

It has been stated in the last preceding [paragraph], who can make a donation and who not, now it is to be explained to whom a donation may be made, and it is to be known that a thing may be given to a serf as well as to a freeman, whether the donation is made by an owner or a non-owner, according to what shall be explained below. Likewise to a female as well as to a male. Likewise to a husband as well as to a wife, together or separately by themselves. Likewise to a minor as well as to a major, provided the authority of a guardian has intervened, but a person cannot be at the same time the enfeoffer and the guardian of a minor, because, when he is the donor, he cannot appoint himself guardian, for so he would appear to continue his own seysine, although he f. 13. has converted all the fruits and profits of the thing given to the uses and advantage of the minor. For it is requisite in each donation, that the giver put himself out of the seysine, as well mentally as corporeally, and corporeally both as regards himself and another. It is requisite that the donatory put himself into the seysine as well mentally and corporeally, and corporeally both as regards himself and another. Likewise, a donation may be made to a bastard as well as to a legitimate person, to himself, or his heirs, or his assigns. Likewise, a donation may be made to several persons, as well as to one

Britton, i.ii. ch. iv. Fleta, 179.

modum donationis, ut infra dicetur. Item dare poterit quis concubinæ suæ, vel alius ab eo concubinæ et pueris suis, natis et nascituris, vel hæredibus eorum vel assignatis, quo casu nullus alteri succedit ex pueris, cum omnes simul feoffati fuerint et teneant in communi, et si aliquis eorum sine hæredibus decesserit, pars decedentis per jus accrescendi remanebit superstitibus et eorum hæredibus, etiam a pluribus usque ad unum, et ad donatorem non revertetur, quamdiu unus superstes fuerit vel hæredes habuerit; sed si omnes sine hæredibus decesserint, res donata ad donatorem revertetur. Si autem donatio facta fuerit concubinæ tantum et hæredibus suis, et legittima fuerit et hæredes habuerit, fratrem vel sororem, nepotem vel neptem, vel remotiores qui in donatione comprehendantur, bene poterit ipsa pueros suos feoffare, unum vel plures, simul vel successive, quamdiu hæredes extiterint, qui donum suum warrantisare possunt, secundum quod dicitur de terra data in maritagium. Si autem concubina hæredem non habuerit, non valebit donatio facta ab ea, sed res ad feoffatorem suum revertetur. Cum autem concubina et pueri sui feoffati fuerint simul, et omnes simul et semel in seysina fuerint, si ejiciantur, omnes simul per assisam novæ disseisinæ recuperabunt, tenendum in communi. Si autem quidam eorum ejiciantur ab extraneo vel participe, eodem modo. Si autem quidam eorum successive decedant, hæredes eorum partem suam recuperabunt per assisam mortis antecessoris. Si autem mater illorum, scilicet concubina, quæ nomine omnium puerorum fuerit in seysina, primo decesserit, si dominus capitalis in absentia puerorum se posuerit in seysinam, et petentibus pueris restituere noluerit, competit eis assisa novæ disseysinæ ex nomine matris, quæ nomine eorum fuerit in seysina ut procuratrix, sive pueri in

person alone, together and at once, or successively, by donation, as will be explained below. Likewise, a person may give to his concubine, or another person [may give] to his concubine and his sons, born or to be born, or their heirs or assigns, in which case none of the sons succeed to the others, since they are all enfeoffed at the same time and are tenants in common; and if any of them shall die without heirs, the share of the deceased by right of accretion will remain to the survivors and to their heirs, from several even unto one, and will not return to the donor, as long as one is surviving, or has heirs; but if they all have died without heirs, the thing given returns to the donor. But if a donation has been made to a concubine only and her heirs, and she is legitimate and has heirs, a brother or a sister, a nephew or a niece, or [kinsfolk] more remote, who are comprehended in the donation, she may well enfeoff her own sons, one or more, together or successively, as long as there are heirs who warrant her donation, according to what is said respecting land given in marriage. But if the concubine has no heirs, the donation made to her will not be valid, and the thing will return to her enfeoffer. But when once a concubine and her sons have been enfeoffed together, and all have been together and at once in seysine [of a thing], if they should be ejected, all will recover together, by an assise of novel disseysine to be tenants in common. But if some of them be ejected by a stranger or by a partner [they will recover] in the same way. But if some of them die successively, their heirs shall recover their share by an assise of the death of an ancestor. But if the mother of them, that is, the concubine, who in the name of all her sons has been in seysine, has first died, if the chief lord, in the absence of the son, has put himself into seysine, and is unwilling to restore it at the petition of the sons, they are competent to bring an assise of novel disseisin in the name of their mother, who has been in seysine of the thing in their

seysina prius extiterint sive non, et per assisam mortis antecessoris, licet nunquam personaliter in seysina extiterint, cum acquisita sit eis possessio per matrem, tanquam per procuratorem vel procuratricem, vel per breve formatum donationis. Ut de itinere Martini de Pateshull in comitatu Herford anno regni regis Henrici quinto in fine rotuli. Item fieri poterit donatio tam viris religiosis, quam aliis, quibus dari poterit. Item tam Judæis, quam Christianis, nisi modus donationis inducat contrarium, scilicet quod licitum sit donatorio rem datam dare vel vendere, cui voluerit, exceptis viris religiosis et Judæis, et quod talibus personis dari non poterit sicut aliis, nulla ratio vel necessitas illud inducit, nisi tantum modus donationis. Item pluribus fieri poterit donatio simul, quorum quidam capere possunt ex tali donatione, quidam non, et unde valida erit donatio quantum ad personas quorundam, invalida autem quantum ad personas aliorum, ut si vir constante matrimonio dederit uxori et pueris communibus, vel ex alio viro progenitis, quia licet donatio non valeat, quantum ad personam uxoris, valebit tamen, quantum ad personas puerorum.

Cod. V. . xvi. § 25.

f. 13 b.

7. Quæ res dari possit et quæ non. Inst. II. 2, § 2. Dig. I. 8, § 1.

Nunc videamus, quæ res dari possit, ad quod notandum, quod rerum alia corporalis, alia incorporalis. Corporalis vero est, quæ tangi possit et videri, ut leo,[1] fundus, vestimentum. Incorporalis vero est, quæ tangi non potest, nec videri, quarum possessio diversimode

[1] "veluti fundus, homo, vestis," &c. is the reading of the Institutes and of Azo's Summa upon the Institutes; but "sicut leo, fundus" is the reading of MSS. Rawl., Crewe, and Gal.

name as their proxy, whether or not her sons have been previously in seysine or not, and by an assise of the death of an ancestor, although they have never been personally in seysine, since they have acquired the possession by their mother as by their proxy, or by a formal brief of donation. As on the Iter of Martin de Pateshull, in the county of Hereford, in the fifth year of King Henry, at the end of the roll. Likewise, a donation may be made to men under religious vows, as well as to others to whom gifts may be made. Likewise to Jews [1] as well as to Christians, unless the mode of donation imports the contrary, namely, that it is permissible to the donatory to give or sell the thing given to him, to whomsoever he will, except to persons under religious vows and to Jews, and that to such persons he cannot give it as to others, neither reason nor necessity imports, except the mode of donation alone. Likewise, a donation may be made to several persons together, of whom some may be able [legally] to take upon such donation, and some not, whence the donation will be valid as regards the persons of some of them, but invalid as regards the persons of others, as if a man during matrimony shall give to his wife and their common sons, or to sons begotten by another man, for although the donation will not be valid as regards the wife, it will be valid, however, as regards the persons of the children. f. 13 b.

7. What things may be given and what not.

Now let us see, what things may be given, upon which it is to be noted, that some are corporeal, and others incorporeal. A corporeal thing is that which can be touched and seen, as a lion, a farm, a robe. An incorporeal thing is that which cannot be touched nor seen, the possession of which things is transferred in different

[1] The capacity of Jews to acquire property for themselves seems to have undergone a change before the fifth book was completed (De Warrantia, ch. 6, § 6), if the passage there inserted be a part of the original work.

Azo, p. 1072, § 1.

transferatur de persona in personam. Et sciendum quod dare potest quis tam alienam rem quam propriam, propriam scilicet, quam habet in præsenti et in manu sua jure hæreditario, vel de perquisito ex quocunque titulo, ad vitam vel in feodo, per se, vel in communi cum alio. Item terram quam habet, vel accidere possit in futuro per mortem alicujus antecessorum suorum, qui tenuerint in feodo, vel post mortem eorum, qui tenuerint ad vitam quocunque titulo. Rem vero sic dare poterit, ut fidelitas et servitium eorum, qui tenuerint ad vitam, attornentur donatorio. Et quo casu, si donatorius post mortem talium primam habuerit seysinam, et hæres petat, dabitur ei exceptio contra hæredem; si autem hæres primam habuerit seysinam, dabitur donatorio actio contra hæredem ex modo donationis sui feoffatoris, et non competit actio donatorio, quæ competit suo donatori, quia quamvis rem ita dare possit, ut prædictum est, tamen actionem suam concedere non potest suo feoffato. Item rem alienam dare poterit quis, et statim convalescit donatio, secundum quod supra dictum est. Item dare poterit quis rem, quam tenet in communi, sicut illam, quam tenet separatim et per se. Item dare potest quis terram, quam alius tenet ad terminum annorum, salvo tamen firmario termino suo, quia istæ duæ possessiones sese compatiuntur in una re, quod unus habeat liberum tenementum et alius terminum. Item donare potest quis cum effectu rem, quæ sua propria est, et non revocabitur donatio. Alienam vero rem dare non poterit cum effectu, quia revocari poterit, sed valebit quoad suum feoffatum, ut suus feoffatus habeat excambium. Et sciendum, quod multipliciter fit donatio, quandoque scilicet in feodo,

ways from person to person. And it is to be known that a person may give a thing which is another's, as well as a thing which is his own, his own, for instance, which he has at the present moment, and in his hand by hereditary right, or as an acquisition of his own, from whatever title, for life or in fee, by himself or in common with another. Likewise land, which he has or which may fall to him at a future time, after the death of one of his ancestors, who has held it in fee, or after the death of those who have held it for life under any title. But he may so give a thing, that the fealty and service of those who have held it for life, may be attourned to the donatory. And in which case, if the donatory after the death of such persons has had the first seysine, and the heir petitions, he will be allowed an exception against the heir; but if the heir has had the first seysine, the donatory will be allowed an action against the heir, according to the manner of donation by his feoffor, and the donatory is not entitled to the action, which the donor is entitled to, for although the latter may so give a thing as has been explained, he cannot grant to his feoffor his right of action. Likewise, a person may give what is another's, and the donation is at once valid, according as has been already observed. Likewise, a person may give a thing which he holds in common, just as a thing which he holds separately and by himself. Likewise, a person may give land which another holds for a term of years, saving always to the former his term, for those two possessions are compatible in one thing, that the one may have the free tenement and the other the term of years. Likewise, a person may give with effect that which is own, and the gift shall not be revoked. But he cannot give with effect that which is another's, because it may be revoked, but it shall be valid as regards his feoffee, that his feoffee shall be entitled to compensation. And it is to be known that a donation is made in manifold ways, sometimes in fee, sometimes for life,

quandoque in vita, quandoque ad feodi firmam, quandoque ad terminum vitæ vel annorum. Si autem ad vitam qualitercunque, statim habet donatorius liberum tenementum, ut, si fuerit ejectus recuperare poterit per assisam novæ disseysinæ, et poterit ille, cui sic data fuit terra illa, alteri dare, vel in feodo, vel ad vitam si voluerit, sed revocari poterit donatio. Sed si ille, qui tenuerit ad vitam, sic et talibus verbis donationem fecerit, de terra quam ad vitam tenuerit, alicui: "Do " et concedo tali quicquid juris habeo in tali terra," etsi qui dat liberum habeat tenementum, non tamen facit ei, cui sic donatur, liberum tenementum, quia dico, "Do tibi jus meum," hoc est terram talem ad vitam meam, scilicet donatoris, non agitur ad vitam donatorii, et ideo donator, licet liberum habuerit tenementum, donatorio tamen per hæc verba liberum tenementum facere non potuit, quia si dixisset, "Do tibi " talem rem in dominico vel in feodo," hoc non esset jus suum sed injuria. Jus autem suum, hoc fuit, dare illud quod habuit, scilicet terram dare ad vitam suam, scilicet donatoris et non ad vitam accipientis, quia hoc esset injuriosum et non justum, et ex hoc liberum tenementum habere non potuit. Et generaliter poterit res, qualitercunque acquisita fuerit, dum tamen tenens illam teneat nomine proprio, sive per disseysinam sive per intrusionem, vel alio modo, facere liberum tenementum donatorio, quod ipse non habet, et statim quantum ad donatorem et donatorium, sed non quantum ad verum dominum. Item donari non poterit res, quæ possideri non potest, sicut res sacra vel religiosa vel quasi, qualis est res fisci, vel quæ sunt quasi sacræ, sicut sunt muri et portæ civitatis. Hujusmodi vero res sacræ a nullo dari possunt, nec possideri, quia in

Britton, l. ii. ch. iii. § 4.
Fleta, 178.
Inst. II. i. § 8.

sometimes in fee-farm, sometimes for a term of life or of years. But if it be for life in any manner, the donatory has immediately a free tenement, so that if he be ejected, he may recover by an assise of novel disseysine, and he to whom that land has been so given, may give it to another, either in fee or for life, if he wishes, but the donation may be revoked. But if he, who has a tenancy for life, makes a donation of the land, of which he is a tenant for life, to anyone, thus and in these words: "I give and concede to such an one whatever right I "have in such land," although he who gives has a free tenement, he does not make it a free tenement for him, to whom it is so given, for I say, "I give you my right," that is, such a land for my life, that is, of the donor; it does not regard the life of the donatory, and therefore the donor, although he may have had a free tenement [for himself], could not, however, by these words make it a free tenement for the donatory, because if he had said, "I give you such a thing in domain or in fee," this would not be his right, but would be a wrong. But his right was this, to give that which he had, that is, to give land for his life, that is, of the donor, and not for the life of the acceptor, because this would be wrong and not just, and hence he could not have a free tenement. And, generally, a thing, in whatever way it may have been acquired, provided the person holding it holds it in his own name, whether by disseysine or by intrusion, or in another manner, may make a free tenement to the donatory, which he himself did not possess, and immediately as regards the donor and the donatory, but not as regards the true owner. Likewise, a thing cannot be the subject of donation, which cannot be the subject of possession, as a thing which is sacred or dedicated to religion, or is, as it were, so, as a thing which belongs to the public treasury, or things which are, as it were, sacred, such as the walls and gates of a city. But sacred things of this kind cannot be given by anyone, nor pos- f. 14.

nullius bonis sunt, id est in bonis alicujus singularis personæ, sed tantum in bonis Dei vel bonis fisci. Item dari non poterunt alicui singulari personæ res, quæ sunt spiritualibus annexæ, sicut corrodia ex abbatibus et domibus religiosis percipienda, et hujusmodi, in quibus nullus sibi vendicare poterit liberum tenementum. Sacræ vero et religiosæ sunt res, quæ rite per pontifices Deo sunt consecratæ et dedicatæ, sicut sunt ecclesiæ tam cathedrales, quam regulares et rurales. Item eis annexa cœmeteria et alia loca, ubi mortui inseruntur, licet non dedicata, sicut tempore interdicti. Item loca, ubi constituuntur abbatiæ, prioratus et aliæ domus religiosæ, quæ in bonis Dei sunt, et etiam diruto ædificio, adhuc locus sacer manet. Item quasi res sacra, ut liber homo, qui vendi non potest, cum libertas non recipiat æstimationem, et est res quasi sacra res fiscalis, quæ dari non potest, nec vendi, nec ad alium transferri a principe vel a rege regnante, et quæ faciunt ipsam coronam, et communem utilitatem respiciunt, sicut est pax et justitia, quæ multas habet species, secundum quod alibi dicetur plenius. Sunt et aliæ res quæ pertinent ad coronam propter privilegium regis, et ita communem non respiciunt utilitatem, quin dari possunt ad alium transferri, quia si transferatur, translatio nulli erit damnosa, nec ipsi regi sive principi, et si hujusmodi res alicui concessæ fuerint, sicut wreccum maris, thesaurus inventus, et grossus piscis, sicut balena, sturgio, et alii pisces regales, oporteat, si inde quæstio habeatur, quod illi, qui hujusmodi libertatem sibi vendicat, doceat hujusmodi ad se pertinere, quia si warrantum non habuerit specialem, in hac liber-

Britton, l. i. ch. xvii. Fleta, 61.

sessed by anyone, for they are the property of no person, that is, not the property of any individual person, but the property of God or of the public treasury. Likewise, things which are annexed to spiritualities cannot be given to any individual person, such as corrodies to be levied upon abbeys and religious houses, and such like, in which no one can claim a free tenement. But things are sacred and religious, which are consecrated and dedicated to God with rites by the pontiffs, such as are cathedral churches, as well as regular and rural churches. Likewise, the cemeteries annexed to them, and other places where the dead are deposited, although not dedicated, as during the time of an interdict. Likewise, places where abbeys, priories, and other religious houses, which are God's property, are set up, and even when the building is destroyed, the place still remains sacred. Likewise, a thing, as it were, sacred, as a free man who cannot be sold, since liberty cannot be appraised, and the property of the public treasury is, as it were, sacred, as it cannot be given away, nor sold, nor transferred to another by a reigning prince or king, and the things which constitute the crown itself, and regard the common interests, such as Peace and Justice, which has many species, according as shall be more fully explained elsewhere. There are also other things which appertain to the crown on account of the king's privilege, and so do not regard the common interests, so as to forbid their being given and transferred to another, because if they are transferred, the transfer will do harm to no one, neither to the king himself nor to the prince, and if things of that kind are granted to any one, as wreck of the sea, treasure-trove, and a great fish, such as a whale, a sturgeon, and other royal fishes, it would be requisite, if a question thereupon arose, that he who claims for himself a liberty of this kind, should show that [a liberty] of this kind belongs to him, for if he have not a special warrant, he will not be able to maintain

tate se defendere non poterit, quamvis pro se prætendat longi temporis præscriptionem; diuturnitas enim temporis in hoc casu injuriam non minuit, sed auget, nec in primo casu, nec in isto, currit tempus contra regem, nec incumbit ei probatio, quod ad ipsum pertineant, cum constare debeat singulis, quod hujusmodi de jure gentium pertineant ad coronam. Sunt etiam aliæ res, quæ pertinent ad coronam, quæ non sunt ita sacræ, quin transferri possunt, sicut sunt fundi, terræ et tenementa et hujusmodi, per quæ corona regis roboratur, et in quibus currit tempus contra regem, sicut contra quamlibet privatam personam. Sunt et aliæ res, quasi sacræ, quæ personam regis respiciunt, et aliquando transferri non possunt, nisi justitiariis domini regis, sicut visus franci plegii, placita de vetito namio,[1] emendatio transgressionis assisarum, judicium latronum, sicut de illis qui habent sock et sack et hujusmodi omnia, quæ pertinent ad pacem, et per consequens ad coronam. Item dici poterunt quasi res sacræ, res datæ in liberam eleemosinam, est enim libera eleemosina et magis libera eleemosina, secundum quod inveniri poterit infra de assisis.

Britton, l. ii. ch. iii. § 3.

Britton, l. iii. ch. ii. § 9.

8. f. 14 b. Quæ exiguntur ad hoc, quod valeat donatio.

Dicendum est etiam quæ exiguntur ad hoc quod valeat donatio cum effectu, quia oportet quod sit mera et pura, libera et non coacta, nec per metum nec per vim extorta. Idem quod pecunia vel servitium non interveniat, ne cadat in causam emptionis et venditionis, quia ubi pecunia intervenerit ibi erit emptio; si autem servitium, ibi erit servitii remuneratio. Ad hoc autem quod valeat donatio, oportet donatorem esse plenæ ætatis, quia si minor donationem fecerit, non valebit, quia in integrum restituetur, si voluerit, cum

[1] The word "namio" is a Latinized form of the Anglo-Saxon word "naam," a taking or seizure. Britton says, l. i. ch. 28, "Naam si "est un general noun a avers et a "chateaus, et a totes choses moe-"bles, que hom put prendre en "noun de detresce" (distress).

himself in that liberty, although he holds out in his own behalf a prescription of length of time: for great length of time in this case does not diminish, but increases the wrong. Nor does time run against the king either in the first case or in the other, for it is not incumbent on the king to prove, that they belong to him, since it ought to be clear to individuals, that [liberties] of this kind belong to the crown by the Law of Nations. There are also other things, which belong to the crown, which are not so sacred, that they cannot be transferred, such as are farms, lands, and tenements, and [things] of this kind, by means of which the crown of the king is strengthened, and in which time runs against the king, as against any private person whatever. There are also other things, which regard the person of the king, which are, as it were, sacred, and sometimes cannot be transferred, except by the justiciaries of the king, as the sight of frank pledge, pleas of forbidden distraint, amendments of the transgression of the assises, the judgment of robbers, as of those who have sock and sack, and all matters of this kind which appertain to peace, and consequently to the crown. Also things given in free alms may be called, as it were, sacred, for there is [simple] free alms and free alms of a higher degree, according as shall be explained below in treating of assises.

8. What things are required in order that a donation should be valid. f. 14 b.

We must next discuss also what things are required, in order that a donation should be valid with effect, for it is requisite, that it be mere and absolute, free and not constrained, nor extorted, through fear or through force. Likewise, that neither money nor service intervene, lest it fall into the class of buying or selling, because where money has intervened, there will be buying, but if service, there will be a remuneration of the service. In addition, in order that the donation should be valid, it is requisite that the donor should be of full age, for if a minor make a donation, it will not avail, for it shall be restored to him in its entirety, if he wishes, when he has come of age.

pervenerit ad ætatem. Et notandum,[1] quod cum donator minori dederit curatorem, et curator nomine minoris fuerit in seysina, si donator postea quacunque ratione se posuerit in seysinam, et inde obierit seysitus, nunquam propter hoc mutabitur status minoris, quin retineat contra quoscunque. Recipere enim poterit per tutoris authoritatem, et consentire donationi sibi factæ. Consentire autem donationi ad[2] se faciendæ, vel admittendi iterum donatorem ad seysinam non potest, alicujus authoritate; meliorem enim suam conditionem facere potest, deteriorem nequaquam. Item non potest tutor, sic datus ab homine, convertere aliquid in usus alicujus donatoris vel alterius, sed tantummodo in usus minoris, quia inde oportet eum reddere rationem minori, cum minor ad ætatem pervenerit, vel si male gesserit, amoveri poterit et alius substitui. Item quod suo nomine possideat et non alieno, alioquin si donaverit, revocari poterit donatio. Item ad minus, quod sit sanæ mentis et bonæ memoriæ, quamvis impotens sui, et in ægritudine detentus et lecto mortali constitutus, quia in tali statu facta donatio valebit, si omnia concurrant, quæ validam faciunt donationem; non enim debet alicui rerum suarum administratio interdici, vel dispositio, cum infirmitate gravetur, dum tamen sit bonæ memoriæ, quia tunc primo necesse habet providere familiæ, et domesticis suis, et parentibus, et stipendia dare et testamenta ordinare; alioquin contingeret talem damnum sentire sine culpa. Sed quoniam aliquando fraudulenter fiant chartæ, et falso finguntur donationes fieri, cum non fiant, ideo ad veritatem declarandam, erit ad pa-

Dig. I. xviii. 133.

[1] "et notandum" down to "alius "substitui" omitted in MSS. Crewe and Rawl.

[2] "ad," this is probably a miswriting for "a" or "ab."

And it is to be noted, that when a donor has appointed a curator to the minor, and the curator, in the name of the minor, has been put into seysine, if the donor afterwards by any means puts himself into seysine and dies afterwards, seysed of the thing, the state of the minor will never be changed on that account, so as not to hold it against whomsoever; for he can accept it by the authority of a guardian, and consent to the donation, when made to himself. But he cannot consent to a donation being made by himself, or to the admission of the donor again into seysine, by anyone's authority, for he can make his own condition better, but by no means worse. Likewise, a guardian, so appointed by a person, cannot convert anything to the use of the donor or of another, but only to the use of the minor, because thenceforth he ought to render an account to the minor, when the minor has come of age, or if he has misconducted himself, he may be removed and another substituted. Likewise, [it is requisite] that [a person] should possess a thing in his own name and not in another's, otherwise if he should make a donation, the donation may be revoked. Likewise, that he should be at least of sound mind and of good memory, although weak of body, and confined by sickness, and set in his death bed, because a donation made in such a state will be valid, if all things should concur, which make a donation valid, for no one ought to be debarred from the administration or disposal of his property, because he is afflicted with infirmity, provided he be of good memory, for then, first of all, he finds it necessary to provide for his family, and those of his household, and his relations, and to assign them payments, and to settle his bequests, otherwise it might happen that such a one should suffer damage without any fault. But since sometimes deeds are fraudulently prepared and fictitious donations are falsely pretended to be made, when they are not made, therefore, in order to declare the truth, it is necessary to have

triam et visinetum recurrendum. Inquisitio enim multipliciter variatur secundum varietatem querelarum, et exempli causa, fiat inquisitio per hæc verba.

9. Breve ad inquirendum in quo statu fuit donator, quando fecit donationem.

Rex vicecomiti, salutem. Præcipimus tibi, quod assumptis tecum custodibus placitorum coronæ nostræ, et præterea duodecem discretis et legalibus militibus de comitatu tuo de tali visineto, in propria persona tua accedas ad talem locum, et per sacramentum diligenter inquiras, si talis, etc. vel aliter. Præcipimus tibi, quod coram te et coram custodibus placitorum coronæ nostræ, in pleno comitatu tuo venire facias duodecem tam milites quam alios liberos et legales et discretos homines de visineto tali, per quos rei veritas melius sciri poterit et negotium expediri. Vel aliter: Præcipimus tibi, quod venire facias coram nobis vel justiciarios nostris tali die apud W. duodecem, etc. ad recognoscendum super sacramentum suum, si A. die, quo debuit dedisse B. tantam terram eum pertinentem in tali villa, fuit ita compos sui, quod itinerare potuit de loco in locum, et ita sanæ mentis et bonæ memoriæ, quod donationem facere potuit et donationi consentire, vel non, etc. Vel aliter: Si A. die, etc. fuit sanæ mentis et bonæ memoriæ, quamvis ægritudine detentus, et si prædictus
f. 15. B., scilicet donatorius, per donum illud seysinam habuit de eadem terra in vita ipsius A. donatoris, scilicet per tantum tempus ante mortem ipsius A. vel non, vel quod si idem A. non fuit sanæ mentis, et ita quod repetatur contrarium per omnia, et unde C. filius et hæres ipsius A. dicit, quod quando donum illud fieri debuit, non fuit idem A. bonæ memoriæ nec compos sui, quod itinerare[1] posset de loco in locum, et inquisitionem, etc. Item alia forma inquisitionis super eodem, scilicet si die, quo terram illam dedit B. per chartam suam, fuit

[1] "nec quod itinerari," MS. Gal.

recourse to the country and the visne. For an inquisition may be varied in a manifold manner according to the variety of complaints, and for example's sake, let an inquisition be made in these words:

9. A writ to inquire in what state a donor was, when he made a donation.

The king to the viscount, health, &c. We enjoin you, that having assumed with yourself the guardians of the pleas of our crown and besides twelve discreet and loyal knights of your county [and] of such a visne, you proceed in your own person to such a place, and by their oath diligently inquire of such a one, &c. Or otherwise: We enjoin you that you cause to come before you and before the guardians of the pleas of our crown in your full county twelve either knights or other free and loyal and discreet men of such a neighbourhood, through whom the truth of the matter may be better known and the business expedited. Or otherwise: We enjoin you that you cause to come before us or before our justiciaries on such a day at W. twelve, &c. to make a recognition upon their oath, if A. on the day, when he ought to have given to B. so much land belonging to him in such a vill, was so far of competent faculties, that he could travel from one place to another, and of so sound a mind and so good a memory, that he could make a donation and consent to a donation or not, &c. Or otherwise: if A. on the day, &c. was of sound mind and good memory, although confined by sickness, and the aforesaid B., that is, the donatory, had f. 15. by that gift the seysine of the same land in the life of A. himself, the donor that is, for so long a time before the death of A. himself, or not, or because that if the same A. were not of sound mind, and so that the contrary be repeated throughout, and whence C., the son and heir of A. himself, says that when that gift ought to have been given, the same A. was not of good memory, nor competent in his faculties to travel from place to place, and the inquisition, &c. Likewise, another form of inquisition as to the same person, for instance, if on the day, on which B. gave that land by his deed, he was of

bonæ memoriæ, et si donum illud ei fecit vel non, et si fuit ita compos sui post donum illud (si aliquod donum ibi fuit) quod itinerare potuit de loco in locum, quamvis paralysi percussus. Si tamen in principio donationis non esset sanæ mentis, postmodum sanæ mentis effectus donum illud ratum habuerit vel non. Et notandum quod si paralyticus itineret[1] de loco in locum, et discretionem habet, ab eo præsumatur, quod omnia rite gesserit, et de aliis non est ita intelligendum, quia quamvis itinerare non possunt, tamen bonam memoriam habere poterunt. Et de hac materia plenius invenies, de termino Michaelis anno regni regis Henrici decimo quinto incipiente decimo sexto in comitatu Berk.[1] de Roberto de Burneby. Item cum quis fuerit impotens sui, sed tamen sanæ mentis. Si aliquis, surrepto sigillo alicujus, chartam fecerit de terris suis sine voluntate et consensu suo ad exhæredationem hæredis, ad instantiam et petitionem hæredis, mittantur milites per præceptum domini regis ad impotentem, ut audiatur ejus confessio, utrum scilicet de voluntate sua et consensu factæ sunt donationes et chartæ, vel non, et si donationes et chartas deadvocaverit, tunc iste, qui fraudem fecerit, summoneatur, quod sit responsurus de fraude illa per tale breve, quod mediate subsequitur.[2]

10. Breve, si donator sit compos mentis.

Rex vicecomiti, salutem. Mitte quatuor legales milites de comitatu tuo apud M. ad A., qui languidus est, ut dicitur, ad videndum in quo statu fuerit, et utrum sit compos sui vel non, et ad inquirendum ab eo, si alicui terras dederit in ægritudine sua, et quibus, et inquisitionem illam nobis vel justiciariis nostris scire facias ad talem diem sub sigillo tuo, etc. Cum autem per inquisitionem constiterit, quod ille, de quo queri-

[1] "Berch," MS. Rawl., viz., Bercheriæ.

[2] "quod mediate subsequitur," not in MSS. Crewe or Rawl., instead of which there is inserted a title descriptive of the object of the writ. "mediate" is evidently a miswriting for "immediate."

good memory, and if he made that donation to him or not, and if he was so competent in his faculties after that donation (if any donation has been there made) that he could travel from place to place, although struck with paralysis. If, however, at the commencement of the donation he was not of sound mind, and afterwards, having become of sound mind, he has ratified that gift or not. And it is to be noted that if a paralytic could make a journey from place to place and had discretion, it is presumed from that fact, that he has done all things properly, and of others it is not so to be understood, because, although they cannot make a journey, they may still have a good memory. And on this subject you will find more in Saint Michael's term in the fifteenth year of the reign of King Henry at the beginning of the sixteenth in the county of Berks, respecting Robert de Burneby. Likewise, when a man is unable to govern himself, although of sound mind, if anyone, having stolen the signet of another, has made a deed concerning his lands without his will and consent to the disheriting of his heir at the instance and petition of the heir, let knights be sent by the injunction of the lord the king to the incompetent person, that his confesssion may be heard, whether, that is, of his own will and consent, the donations have been made or not, and if he should disavow the donations and the deeds, then let him, who has committed the fraud, be summoned to answer for that fraud by such a writ as immediately follows:

10. A writ [to inquire], if the donor was of capable mind.

The king to the viscount, health. Send four loyal knights of your county to M. unto A., who is sick, as is reported, to see in what state he is, and whether he is competent or not, and to inquire from him, if he has given his lands to anybody during his illness, and to whom, and make known to us or to our justiciaries that inquisition on such a day under your seal, &c. But when it has been ascertained by the inquisition that he, about whom complaint has been made, has committed a

tur, fraudem fecerit, summoneatur ille, quod veniat responsurus per tale breve.

11. Breve de summonendo tenentem.

Rex vicecomiti, salutem. Bene recolimus, nos ad instantiam A. hæredis B. misisse te et quatuor milites ad prædictum B. ad videndum statum suum, et utrum esset compos sui vel non, et similiter ad audiendum, si aliquas terras dedisset in ægritudine et in impotentia sua, et quibus, et tu simul cum prædictis militibus nobis scripsisti, quod ipsum infirmum et impotentem invenisti, et quod coram te et prædictis militibus et multis aliis tunc ibi præsentibus recognovit, quod tali de N. nunquam terras aliquas dederit, nec chartam ei de aliquo dono fecerat, et quia prædictus A. hæres ipsius B. adhuc nobis conqueritur, quod prædictus talis, qui sigillum ipsius B. patris sui dudum habuerat, vel surripuerat per infirmitatem et impotentiam ipsius B., ut dicitur, per se et sine ipso B. vel ballivo suo, propria authoritate se posuit in terras ipsius B. apud talem locum, et chartas de prædicto sigillo, (quod penes se habet,) de prædictis terris sibi fecit, ad exhæredationem ipsius A., et quia nemini debet fraus sua patrocinari, nec sustinere, nolumus, sicut nec debemus, quod aliquis exhæredetur injuste, tibi præcipimus, quod si prædictus A. fecerit te securum, etc., tunc summoneas per bonos summonitores talem, quod sit, etc. ad ostendendum quo warranto se posuit in prædictas terras. Summoneas etiam per bonos summonitores, etc. duodecem tam milites quam alios, etc., ad recognoscendum, etc. si prædictus B. terram illam dederit prædicto tali et chartam suam ei inde fecerit vel non, et si terras illas ei dedit, et chartam suam ei inde fecerit, in quo statu tunc fuerit, utrum, scilicet, compos sui et bonæ memoriæ, cum sano

f. 15 b.

fraud, let him be summoned to answer by a writ of this kind:

11. A writ to summons the tenant.

The king to the viscount, health. We well recollect that we, at the instance of A., the heir of B., sent you and four knights to the aforesaid B. to see his state, and whether he was competent in his faculties or not, and at the same time to hear whether he had granted some lands during his sickness, and during his incompetency, and to whom, and you, together with some knights, wrote to us that you had found him sick and incompetent, and that before you and the aforesaid knights and many others then [and] there present, he had acknowledged that he had never given any land to so-and-so of N., nor had executed any deed for him respecting any donation, and because the aforesaid A., the heir of that very B., still complains to us, that so-and-so aforesaid, who had for a long time the seal of B. himself, his father, or had surreptitiously obtained it during the infirmity and incompetency of B. himself, as it is said, by himself, and without B., or his bailiff, of his own authority, put himself into the lands of B. at such a place, and executed a deed to himself of the aforesaid lands with the aforesaid seal (which he had in his possession), to the disinheritance of A. himself, and because no man ought to be benefitted nor aided by his own fraud, we are unwilling, f. 15 b. as well as we are bound, not to allow, that anyone should be unjustly deprived of his inheritance, we enjoin you that if the aforesaid A. will give you security, &c., then summon by good summoners such a person, that he, &c., to show by what warrant he has put himself into the aforesaid lands. Summon also by good summoners, &c. twelve as well knights as others, &c. to recognise, &c. if the aforesaid B. has given that land to so-and-so aforesaid, and has executed for him his grant thereof or not, and if he has granted to him those lands, and has executed for him his deed thereof, in what state he then was, whether, for instance, he was competent and of good

intellectu et sensu integro, quando donum illud fecit vel non, et similiter per quem prædictus talis inde positus fuit in seysinam, et habeas ibi, etc. Ad quæ quidem poterit summonitus respondere, quod licet donatio illa minus sufficiens haberet initium, idem B. postea coram probis hominibus ratam habuit illam donationem, et illam confirmavit, et inde, si mutata voluntate velit impugnare postea factum, quod suum fuit per ratificationem et suam confirmationem, hoc ei nocere non debeat, cum sufficere debeat semel voluisse.

12. Quod certa sit res, quæ dari debet.

Oportet etiam, quod certa res deducatur in donationem, quia incertæ rei nulla est donatio. Item oportet, quod certa res sit, quamvis incertus sit rei eventus, ut si dicat quis, dabo tibi talem rem, cum mihi acciderit post mortem talis antecessoris, vel cum ita factum sit, vel non factum, vel cum hoc sequutum fuerit, vel non sequutum. Et eodem modo, cum certa debeat esse res, quæ donatur, vel promittitur, ita oportet, quod sit res certa, quæ redonatur vel repromittitur, sicut homagium vel servitium certum, et sic cadit donatio in unum quatuor contractuum nominatorum, ut si dicam, do tibi istam rem certam pro homagio et servitio tuo, oportet quod servitia certa sunt [1] et expressa in scriptis, vel sine scriptis, quibus expressis, omnia alia servitia et consuetudines remittuntur, et si scriptura non intervenerit, recurrendum erit ad communem usum, ut tale servitium fiat et tantundem, quantum faciunt tenentes tantum terræ in eadem villa de eodem feodo. Et si de usu contentio oriatur, recurrendum erit ad inquisitionem patriæ, vel ad magnam assisam. Item oportet quod certa verba interveniant donationi congrua sicut et sti-

[1] "sint," MSS. Crewe and Rawl.

memory, with a sound understanding and entire sense, when he made that donation, or not, and in like manner through whom so-and-so aforesaid was thereupon placed in seysine, and have there, &c. To which indeed being summoned he may answer, that although that donation had an insufficient commencement, the same B. afterwards, in the presence of honest men, ratified that gift and confirmed it, and thereupon if, having changed his will, he wishes to impugn a subsequent act, which was his own by his own ratification and confirmation, this ought not to hurt him, since it ought to be sufficient that he once wished it.

12. That the thing, which is given, ought to be certain.

It is requisite, also, that a certain thing be brought into donation, because there is no donation of an uncertain thing. Likewise, it is requisite that the thing be certain, although the event of the thing may be uncertain, as if one should say, I will give you such a thing, when it has fallen in to me after the death of such an ancestor, or when it has so happened, or not happened, or when so-and-so has followed or has not followed. And in the same manner since the thing, which is granted or promised, ought to be certain, so it is requisite that the thing should be certain, which is granted in return, or is promised in return, as homage or a certain service, and so donation falls in to one of four named contracts, as, if I should say, I give you that thing certain, in consideration of your homage and service, it is requisite that the services should be certain and expressed in writing or without writing, which being expressed, all other services and customs are remitted, and if a writing does not intervene, recourse shall be had to the common usage, and that such and so much service be done, as tenants do of so much land in the same vill of the same fee. And if a dispute arise as to the usage, recourse shall be had to an inquisition of the country, or to a great assise. Likewise, it is requisite that certain words should intervene suitable to a donation, as also to

Inst. III. t. xvi. pulationi, ut si dicam, dabis mihi centum? et respondeas, dabo, quia non valet interrogatio, nisi sequatur responsio interrogationi conveniens, scilicet dabo, et ex tali interrogatione et responsione statim sequitur obligatio. Item si scriptura intervenerit, validior erit donatio, quia probari poterit donatio facilius et melius per scripturam et instrumenta, quam per testes vel per sectam.[1] Et de chartis et fide instrumentorum dicetur plenius infra. Item non valet donatio, nis tam dantis quam accipientis concurrat mutuus consensus et voluntas, scilicet quod donator habeat animum donandi, et donatorius animum recipiendi. Nuda enim donatio, et nuda pactio non obligant aliquem, nec faciunt aliquem debitorem; ut si dicam, do tibi talem rem, et non habeam animum donandi, nec tradendi, nec a traditione incipiam, non valet, ut si dicam, Do tibi istam rem, et illam nolui tradere, et sustinere quod illam tecum feras, vel arborem datam succidas, non valet donatio, quia donator plene non consentit. Item oportet quod non sit error in re data, quia si donator senserit de una re et donatorius de alia, non valet donatio propter dissensum; et idem erit, si dissensio fiat in genere, numero, et quantitate. In genere, ut si quis dicat, Do tibi tale manerium certum, et donatorius senserit de alio, quamvis seysinam occupaverit, sibi tamen nihil acquirit. Numero, ut si quis decem dederit, et alius senserit de viginti, non valet quamvis major numerus contineat in se minorem, quia uterque in certum numerum non consentit. Sed hic error nocebit in persona donatorii. Sed quid, si aliquis dederit decem, et dona-

Dig. XXXIX. t. 5, § 10.

Azo, Rubr. 13.

Dig. L. t. 17 § 116, 2.

f. 16.

Dig. XLV. t. i. § 4.

[1] Proof, "per sectam" is discussed below, f. 290 b. and f. 315 b.

a stipulation, as if I should say, will you give me a hundred, and you should answer I will give; for the interrogation is of no validity, unless an answer follows suitable to the interrogation, as for instance, I will give, and from such an interrogation and [such an] answer an obligation forthwith results. Likewise, if a writing intervene, the donation will be more valid, because the donation can be proved more easily and better by a writing and by instruments, than by witnesses or by a sect. And we shall speak more fully below on the subject of deeds and the faith of instruments. Likewise, a donation is not valid unless the mutual consent and will of the giver as of the acceptor concur, and that the donor had the intention to give, and the donatory [had] the intention to accept. For a nude donation and a nude pact, do not oblige anyone, nor make anyone a debtor, as, if I should say, I give you such a thing, and I have not the intention to give nor to deliver [anything], and I do not begin to deliver it, it is not valid, as, if I should say, I give you such a thing, and I have been unwilling to deliver it, and to allow that you should take it with you, or that you should cut down a tree given to you, the donation is not valid, because the donor has not fully consented. Likewise, it is requisite that there should be no error in the thing given, because if the donor meant one thing, and the donatory another, the donation is not 16.
valid on account of the diverse intention and the same result follows, if there be a diverse intention in kind, or in number, or in quantity. In kind, as if one should say, I give you such a certain manor, and the donatory understood him respecting another manor, although he has obtained seysine, he has acquired nothing for himself. In number, as if one has given ten and another has understood twenty, it is invalid, notwithstanding the greater number contains the smaller number, because each has not consented to the same certain number. But this error will be fatal in the person of the donatory. But what if any-

torius consenserit in quinque, valet donatio, quia consentiunt ambo in minorem numerum, sic non est[1] in primo casu, quia in primo casu donator non consentit in majorem numerum, et hic consentit in utrumque, quia si in majorem, per consequens in minorem, sed non convertitur. Item in quantitate, ut si quis dicat, Do tibi decem libratas terræ in tali manerio, quod forte valet viginti libras, et donatorius totum occupet, non valet donatio, quia donator in viginti libras non consentit. Aliud tamen est, si dicat, Do tibi tale manerium pro decem libratis terræ, cum valet viginti, valet donatio. Idem est si dicat donator, Do tibi decem acras in tali loco, et donatorius sentiat de viginti, non valet donatio ut supra. Sed quid si donatorius de decem sentiat, cum donator decem dederit, et occupet viginti, valet donatio, quia hic non est error, sed præsumptio, quæ corrigi poterit de superfluo. Item si dicat donator, Do tibi tantam terram pro decem libratis terræ, et ibi sunt viginti, adhuc valet donatio, quia neuter errat, nec est deceptus, quia licet error sit in valore, non tamen in re errant. Item si dicat donator, Do tibi decem libratas, et donatorius consentit in quinque, adhuc valet donatio, quia nullus est error, qui noceat, quia uterque consentit in eundem numerum, quia, qui consentit in decem, per consequens in quinque consentit, major enim numerus in se continet minorem. Et in fine notandum, quod, si in corpus quod traditur sit consensum, non nocet, quamvis circa causam dandi atque recipiendi sit dissensio; ut, si pecuniam numera-

[1] "sed non est," MS. Crewe.

one has given ten, and the donatory has consented to five, the donation is valid, because both have consented to the smaller number; it is not so in the first case, because in the first case, the donor does not consent to the greater number, and here he consents to each number, for if he consents to the greater, he consequently consents to the smaller number, but the case is not convertible. Likewise in quantity, as if one should say, I give you ten pounds' worth of land in such a manor, which is perhaps worth twenty pounds, and the donatory occupies the whole, the donation is not valid, because the donor is not consenting to the twenty pounds. It is another thing, if he should say, I give you such a manor as worth ten pounds' worth of land, when it is worth twenty, the donation is valid. It is the same, if a donor should say, I give you ten acres in such a place, and the donatory understands twenty acres, the donation is not valid, as above. But what, if the donatory understands ten, when the donor has given ten, and he occupies twenty, the donation is valid, because here there is no error, but a presumption, which may be corrected as regards the superfluous quantity. Likewise, if the donor should say, I give you so much land for ten pounds' worth of land, and there are there twenty pounds' worth, the donation is still valid, because neither [person] errs nor is deceived, because although there be error in the value, they are not in error in the matter. Likewise, if the donor should say, I give you ten pounds' worth, and the donatory consents to five, the donation is still valid; there is no error which can harm, for each consents to the same number, because he who consents to ten consents, in consequence, to five, for the greater number contains within itself the smaller number. And, finally, it is to be noted, that if there is an agreement as to the substance which is delivered, there is no prejudice, although there be disagreement about the cause of giving and of accepting, as if I shall deliver to you a sum of money, or something to so-and-so, and

tam tibi tradam, vel quid tali, et tu eam quasi traditam accipias, constat ad te proprietatem transire. Item in quibusdam donationibus oportet, quod aliorum consensus interveniant, quam donatoris et donatorii; ut si archiepiscopus, episcopus, abbas et prior, rector ecclesiarum, syndicus vel procurator donationem fecerint, omnium eorum, quorum interfuerit, requirendus erit consensus, sicut regis, et capituli vel conventus. Item oportet quod donationem sequatur rei traditio, etiam in vita donatoris, et donatorii, alioquin dicetur talis donatio potius nuda promissio quam donatio, et ex nuda promissione non nascitur actio, non magis quam ex nudo pacto, non enim valet donatio imperfecta, nec chartæ confectio, nec homagii captio cum omni solemnitate adhibita, nisi subsequuta fuerit seysina et traditio in vita donatoris, et unde si donatorius post mortem donatoris se intruserit, statim ejiciatur, vel etiam post aliquod intervallum temporis, per assisam novæ disseysinæ non recuperabit, nec hæres donatoris tenebitur ad homagium suum capiendum, licet factum fuerit sui antecessoris. Et qualiter traditionibus et usu captionibus rerum dominia transferuntur, dicetur plenius
f. 16 b. in titulo, de acquirenda possessione. Item quia conventiones, conditiones et pacta et modi diversi donationum incidunt in donationibus, si incontinenti apponantur, legem dant donationi et donationem infirmant, et dant exceptionem donatori, et ligant personas contrahentium et obligant ipsam rem datam, et transeunt cum ipsa re de persona in personam. Si autem ex intervallo adjiciantur, non insunt omnino donationibus, sed perimunt quandoque actionem, quandoque exceptionem ut probatur, C. de pactis, in bonæ fidei et
Cod. l. ii. t. iii. § 13. lege sequenti, et ita contrahitur donatio,[1] ut si dicam,

[1] "ut probatur" down to "donatio" is omitted in MS. Rawl. and in MSS. Crewe and Glas.

you accept it as delivered to you, it is settled that the property passes to you. Likewise, in certain donations, it is requisite, that the consent of others should intervene besides that of the donor and the donatory, as if an archbishop, bishop, abbot and prior, a rector of churches, a syndic or a proxy has made a donation, the consent of all those, who are interested, is required, as of the king, and of the chapter, or of the convent. Likewise, it is requisite that the delivery of the thing follow the donation, even in the lifetime of the donor and of the donatory, otherwise such a donation will be called rather a bare promise than a gift, and no action arises out of a bare promise any more than out of a bare fact, for an imperfect donation is not valid, nor the execution of a deed, nor the taking of homage, although every solemnity has been observed, unless seysine has followed and delivery during the life of the donor, whence, if the donatory shall intrude himself after the death of the donor, and should be immediately ejected, or even after some interval of time, he shall not recover by a writ of novel disseysine, nor shall the heir of the donor be bound to accept his homage, although his ancestor has accepted it. And in what way the dominion of things is transferred by delivery and usucaption will be discussed hereafter, in the title concerning the acquisition of possession. f. 16 b.
Likewise, because conventions, conditions, and pacts, and different modes of donations are incident to donations, if they are forthwith applied, they impose a law upon the donation, and they invalidate the donation and raise an exception to the donor, and bind the persons, who contract, and oblige the thing itself given, and pass with the thing itself from person to person. But if they be added after an interval, they are not altogether inherent in the donations, but destroy sometimes the action, sometimes the exception, as is proved in the code concerning facts commencing with the words "In bonæ "fidei," and in the law following, and a donation is

Dig. II. t. 14.

Do tibi hoc, ut facias, et concurrant ista prædicta secundum quod videri poterit de verbis pactorum C.[1] per hos versus:

Re, verbis, scripto, consensu, traditione,
Junctura, vestes sumere pacta solent.

13. Quod donatio sit gratuita, et non coacta.

Item gratuita debet esse donatio et non coacta, nec per metum vel vi extorta, ut si quis cartam et donationem cognoverit requisitus, excipiat tamen, quod valere non debeat, eo quod per metum et coactionem tempore guerræ, aliove quocunque tempore illam fecerit, revocabitur donatio; dum tamen, cum vim majorem et coactionem evaserit, statim reclamet, ut si tempore guerræ illata fuerit violentia, statim post guerram reclamet, alioquin sibi præjudicat imperpetuum, cum per dissimulationem consentire videatur, ut inter placita, quæ sequuntur regem, anno regni regis Henrici decimonono, assisa præsentationis, inter priorem de Wallingford et Rogerum de Quincy et Simonem de Thennore, qui venit a latere. Si autem tempore pacis compulsus fuerit quis per metum et vim in prisona ad aliquid dandum vel faciendum contra voluntatem suam, cum a prisona et violentia evaserit, statim debet levare hutesium et clamorem, et cum hutesio et clamore accedere debet ad villas propinquiores, et ad servientes regis, et postea ad comitatum, et ibi ostendere violentiam ei factam; ut sic revocabitur quod actum erit: si autem dissimulaverit, videtur consentire, ut supra; ut de quodam itinere, scilicet Stephani de Segrave in comitatu Kantiæ de Petro de Beke, qui summonitus fuit ad war-

[1] "de verbis pactorum C.," omitted MSS. Rawl., Crewe, and Glas.

thus contracted, as if I shall say, I give you this, that you may do, and the things aforesaid concur, according to what may be seen concerning the words of pacts in the Code under this couplet:

Re, verbis, scripto, consensu, traditione,
Junctura, vestes sumere pacta solent.

Pacts are usually clothed with substance, words, writing, consent, delivery, jointure.

13. That a donation should be gratuitous, and not constrained.

Likewise, a donation ought to be gratuitous and not constrained, nor extorted by fear or violence, as if a person, when required, has acknowledged a deed and a donation, and he, nevertheless, should object that it ought not to be valid, for the reason that he made it through fear and constraint in time of war or at any other time, the donation will be revoked, provided that, when he has escaped from the superior power and compulsion, he shall immediately make a reclamation, as if the violence was done to him in time of war, he shall make a reclamation immediately after the war, otherwise he prejudices himself for ever, since he would seem to consent through dissimulation, as amongst the pleas which follow the king, in the nineteenth year of King Henry, at an assise of presentation, between the prior of Wallingford and Roger de Quincy and Simon de Thennor, who appeared separately. But if a person has been compelled in time of peace, by fear and violence in prison, to give something or to do something contrary to his will, he ought, when he has escaped from prison or violence, to raise the hue and cry, and he ought to hasten with the hue and cry to the nearest vills and to the king's sergeants, and afterwards to the county, and there make known the violence done to him, and so what has been executed by him shall be revoked; but if he has dissembled it, he has the appearance of consenting to it, as above. As in a certain Iter, for instance, of Stephen de Segrave, in the county of Kent, concerning Peter de Beke, who was summoned to

rantisandum Falconi de Breante[1] quandam cartam de manerio de Middleton, et unde judicium redditum fuit apud Westmonasterium. Et non solum excusatur quis qui exceptionem habet, si sibi ipsi inferatur vis vel metus; sed etiam si suis, ut si filio vel filiæ, fratri vel sorori, vel aliis domesticis et propinquis, sicut de eodem Falcone, qui tenuit in prisona fratrem cujusdam, donec frater ejusdem, qui fuit extra prisonam, dedit ei quoddam manerium. Quid autem sit vis, inferius dicetur in tractatu de assisa novæ disseysinæ, et ibi, qualiter dividatur. Et hic dicendum est quid sit metus.

14. Quid sit metus. Azo in Cod. ii. 28. Dig. IV. ii.

Metus autem est præsentis vel futuri periculi causa mentis trepidatio; et præsentem debemus accipere metum, non suspicionem inferendi ejus, vel cujuslibet vani vel meticulosi hominis, sed talem qui cadere possit in virum constantem, talis enim debet esse metus, qui in se contineat mortis periculum et corporis[2] cruciatum. Refert autem utrum metus præveniat donationem, vel subsequatur; quia si primo coactus et per metum compulsus promisero, et postea sponte et gratis dedero, talis metus non excusat. Si autem primo gratis promisero, et postea per metum coactus tradidero, iste metus excusat, propter violentiam tradendi et compulsionem, cum forte mutata sit prima voluntas transferendi rem ad donatorium. Sed quid, si quis ab hoste captus et in prisona detentus donationem fecerit, quæritur an valeat? Quod valeat videtur prima facie, si quidem talem donationem, dum fuerit in tali statu, fecerit alicui parenti vel amico, militi vel servienti suo bene merito, revera nulla intervenerit coactio, nec metus in donatione facienda, sed donator hoc affectavit,[3]

Dig. IV. ii. §§ 6, 7.

f. 17.

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[1] "Breance," MS. Crewe.

[2] "vitæ," MS. Glas.

[3] "assignavit," MS. Crewe. MSS. Rawl. and Glas. agree with the text.

warrant to Fulk de Breante a certain deed concerning the manor of Middleton, and whereupon judgment was given at Westminster. And not only is a person excused, who objects, that he has had violence or fear applied to himself, but also if they have been applied to his son or daughter, to his brother or sister, or to others of his household or of his kinsfolk, as concerning the same Fulk, who kept in prison the brother of a certain individual, until the brother who was out of prison gave him a certain manor. But what constitutes violence will be explained below, in the treatise of novel disseysine, and there in what way it is divided. And here we will discuss, what is fear.

14. What constitutes fear.

Fear, indeed, is mental trepidation on account of present or future danger, and we must hold present fear to be, not the suspicion of danger to be incurred, nor [the suspicion] of a vain or of a timid person, but such as may happen to a resolute man, for fear ought to be such as contains in itself the danger of death, or the torture of the body. But it is of importance whether fear precedes or follows a donation, for if I have promised at first under compulsion and from fear, and shall afterwards have given spontaneously and gratuitously, such fear does not excuse. But if I have at first promised gratuitously, and have afterwards, through fear, delivered the thing, such fear excuses, on account of the violence of the delivery and the compulsion, since by chance the first wish of transferring the thing to the donatory may have been changed. f. 17. But what, if a person captured by the enemy and detained in prison has made a donation, it is questioned, if it is valid; it appears at first sight to be valid, if indeed he has made such a gift, when he was in that state, to some relative or friend, to some soldier, or deserving attendant on himself, and in truth no compulsion has intervened nor fear in making the donation, but the donor has this in view, that he should give it to such an one, whence it seems that the gift was mere and

ut donaret tali, unde videtur, quod mera et libera et pura sit donatio, et ideo quod valere debeat. Et si eam invitus faceret ita per prisonam, ad hoc coactus per vim, cui resistere non posset, videtur quod valere non debeat vice versa. Unde videtur, quod in prisona donationem facere potest et non potest, secundum tamen diversos respectus. Respondeo, in neutro casu valet donatio, quamdiu quis fuerit in prisona, vel quia hoc facit per coactionem, "et quia potestatem sui non habet." [1] Et qui potestatem sui non habet, nec eorum, quæ sua esse debent, potestatem habebit. Et generaliter, qui ab aliis possidetur, ipse nihil poterit possidere, et sicut ille, qui in servitute fuerit, nihil possidere poterit, quia possidetur, ita nec ille, qui possidetur ab hostibus vel detentus fuerit. Sed cum talis ita ab hostibus detentus naturalem receperit libertatem, hoc est cum suæ potestatis effectus fuerit, res ita gestas potest vel ratificare vel infirmare, et ita quod, si postmodum res ita gestas approbaverit, vel statim donum non revocando, vel homagium vel servitium recipiendo, valet.

Britton, l. ii. ch. iii. § 7. Fleta, 178.

Cap. VI.

1. De diversis modis donationum, quod alia sit simplex et pura, et alia conditionalis vel sub modo.

Donationum alia divisio, scilicet quod alia simplex et pura, alia conditionalis, alia sub modo, uni facta, vel pluribus successive. Item alia conditionalis, quæ pluribus est adjectis conditionibus. Item alia de re in maritagium data, alia de re data viris religiosis, alia de re data bastardis, alia de re data ad feodi firmam, alia de re data ad vitam quocunque modo, alia quæ idem est quod concessio et non donatio, sicut de re concessa ad terminum annorum. Simplex autem et pura dici poterit, ubi nulla est adjecta conditio nec

[1] "et quia" down to "non habet" omitted in MS. Crewe. MSS. Rawl. and Glas. agree with the text.

free and absolute, and therefore that it ought to be valid. And if he has unwillingly so made it, through being in prison, constrained to it by force, which he could not resist, it seems that it ought not to be valid, and vice versâ. Whence it seems, that he may make a donation in prison and that he may not, according, however, to different considerations. I answer, in neither case is the donation valid as long as a person is in prison, or because he does this under constraint, and because he is not his own master. And he, who is not his own master, will not be master of the things, which ought to be his own. And, generally, he, who is in the possession of others, cannot himself possess anything, and as he who is in serfage cannot possess anything, because he is in the possession [of another], so neither he who is in the possession of an enemy, or is detained by him. But when such a person so detained by an enemy has recovered his natural liberty, that is, has been restored to his own power, he may ratify or invalidate things so done by him, and so that, if afterwards he has approved things so done by him, either by not immediately revoking the gift, or by receiving homage or service, it is valid.

Chapter VI.

1. Of various modes of donation, that one is simple and pure, and another is conditional and modified.

There is another division of donations, for instance, one is simple and absolute, another is conditional, another modified, made to one person, or to several successively. Likewise, another is conditional, which is made with the addition of several conditions. Likewise, another is of a thing given for a marriage portion, another of a thing given to men under religious vows, another of a thing given to bastards, another of a thing given in fee-farm, another of a thing given for life in any manner whatever, another which is the same as a concession and not a donation, as of a thing granted for a term of years. But it may be termed simple and absolute, when there is no condition or mode attached to it, for it may be said to

modus; simpliciter enim dari dicitur, quod nullo adjecto datur. Ut si dicatur, Do tali tantam terram in villa tali pro homagio et servitio suo, habendam et tenendam eidem tali et hæredibus suis de me et hæredibus meis, reddendo inde annuatim, ipse et hæredes sui mihi et hæredibus meis, tantum, ad tales terminos, pro omni servitio, et consuetudine seculari et demanda, ita quod certa sit res quæ datur, et certa servitia et consuetudines quæ domino debentur, licet incerta sunt alia quæ tacite remittuntur; et ego et hæredes mei warrantizabimus, acquietabimus, et defendemus imperpetuum prædictum talem et hæredes suos versus omnes gentes per prædictum servitium, et sic acquirit donatarius rem donatam ex causa donationis, et hæredes ejus post eum ex causa successionis, et nihil acquirit ex donatione facta antecessori, quia cum donatorio non est feoffatus. Et per hoc, quod dicitur tali et hæredibus suis (large sumpto vocabulo hæredes) continentur omnes hæredes, tam propinqui quam remoti, tam præsentes quam futuri, sed tamen unus eorum, vel plures qui sunt quasi unus, et propinquiores remotioribus præferuntur, ut infra dicetur de successionibus. Item augere poterit donationem et facere alios quasi hæredes, licet re vera hæredes non sunt, ut si dicat in donatione, habendum et tenendum tali et hæredibus suis, vel cui terram illam dare vel assignare voluerit; et ego et hæredes mei warrantizabimus eidem tali et hæredibus suis, vel cui terram illam dare voluerit vel assignare, et eorum hæredibus contra omnes gentes. In quo casu, si donatorius terram illam dederit vel assignaverit, si donatorius et hæredes sui defecerint, donator et hæredes sui incipiunt esse loco donatorii et hæredum suorum, et pro hærede donatorii erunt, quoad warrantizandum assignatis et hæredibus eorum, per clausulam

f. 17 b.

Britton, l. ii. ch. iv. § 2.

Fleta, 191.

be given simply whatever is given, with nothing added to. As if it should be said, I give to such a person so much land in such a vill for his homage and service, to have and to hold to such a one, and to his heirs of me and of my heirs, rendering thence annually, himself and his heirs to me and my heirs, so much for such terms, for all service and secular custom and demand, so that the thing may be certain, which is given, and the services certain, and the customs which are due to the lord, although the other things are uncertain, which are tacitly remitted, and I and my heirs shall warrant, acquit, and defend for ever so-and-so aforesaid, and his heirs, against all persons, through the aforesaid service, and so the donatory acquires the thing given by reason of the donation, and his heirs after him by reason of their succession, and the heir acquires nothing from the gift made to his ancestor, because he was not enfeoffed with the donatory. And by the expression to so-and-so and his heirs (the word heirs being taken in a wide sense) all heirs are contained as well near as remote, as well present as future, but nevertheless one of them or several who are equivalent to one and the nearer are preferred to the more remote as will be explained here- f. 17 b.
after on the subject of successions. Likewise, he may increase the donations and make, as it were, heirs, although in truth they are not heirs, as if he should say in the donation, to have and to hold to such an one and his heirs, or to him to whom he shall wish to give or assign that land: and I and my heirs will warrant to the same so-and-so and his heirs, or to him to whom he has wished to give or assign that land, and to their heirs, against all persons. In which case, if the donatory has given or assigned that land, if the donatory and his heirs fail, the donor and his heirs begin to be in the place of the donatory and his heirs, and the donatories will take the place of heirs, as far as regards the warrant to be made to the assigns and his heirs, through the clause contained

contentam in charta primi donatoris, quod quidem non esset, nisi mentio fieret de assignatis in prima donatione. Sed quamdiu primus donatorius superstes fuerit vel ejus hæredes, ipsi tenentur ad warrantiam, et non primus donator. Item sicut ampliari possunt hæredes, sicut prædictum est, ita coarctari poterunt per modum donationis, quod omnes hæredes generaliter ad successionem non vocantur. Modus enim legem dat donationi, et modus tenendus est contra jus commune, et contra legem, quia modus et conventio vincunt legem, ut si dicatur, Do tali tantam terram cum pertinentiis in N. habendam et tenendam sibi et hæredibus suis, quos de carne sua et uxore sibi desponsata procreatos habuerit. Vel sic, Do tali et tali uxori suæ, vel cum tali filia mea, etc. Habendum et tenendum sibi et hæredibus suis de carne talis uxoris vel filiæ exeuntibus, vel procreatis, vel procreandis; quo casu, cum certi hæredes exprimantur in donatione, videri poterit quod tantum fit descensus ad ipsos hæredes communes, per modum in donatione appositum, omnibus aliis hæredibus suis a successione penitus exclusis, quia hoc voluit donator. Et unde si hujusmodi hæredes procreati fuerint, ipsi tantum vocantur ad successionem, et si taliter feoffatus aliquem ulterius inde feoffaverit, tenet feoffamentum, et hæredes tenentur ad warrantiam, cum ipsi nihil clamare possunt nisi ex successione et descensu parentum; quamvis quibusdam videatur, quod ipsi feoffati fuerint cum parentibus, quod non est verum. Si autem nullos tales hæredes habuerit, revertetur terra illa ad donatorem per conditionem tacitam, etiam si nulla fiat mentio in donatione, quod revertatur, vel si expressa mentio in donatione habeatur; et

in the deed of the first donor, which would not be the case, unless mention had been made of assigns in the first donation. But as long as the first donatory or his heirs survive, they are themselves bound to the warranty and not the first donor. Likewise, as heirs may be enlarged in number, as has been afore said, so they may be narrowed in number by the mode of donation, whereby all the heirs are not called generally to the succession. For a mode sets law to the donation, and a mode is to be upheld against the common right, and against the [general] law, for a mode and an agreement must prevail against the [general] law, as if it should be said, I give to so-and-so that land, with its appurtenances, in N., to have and to hold to him and his heirs, whom he shall have procreated from himself or his espoused wife; or thus: I give to so-and-so, and so-and-so his wife, or with so-and-so my daughter &c., to have and to hold to himself and to his heirs, issuing or procreated, or to be procreated, of the flesh of such wife or daughter, in which case, if since certain heirs are expressed in the donation, it can be seen that the descent is only made to their common heirs according to the mode appointed in the donation, all other his heirs being excluded altogether from the succession, because the donor has so willed. Whence, if heirs of this kind are procreated, they only are called to the inheritance, and if a person so enfeoffed has further enfeoffed some person, he holds the enfeoffment, and his heirs are held to the warranty, since they can claim nothing except from the succession and the descent of parents, although it appears to some, that they were themselves enfeoffed at the same time with their parents, which is not true. But, if he shall have no such heirs, that land will revert to the donor, through a tacit condition, even if there be no mention made in the donation that it should return, or if express mention has been made in the donation; and so it will happen,

ita erit si hæredes aliquando extiterint et defecerint. Sed in primo casu, ubi nullus extiterit, semper erit res data donatorio liberum tenementum et non feodum. Item in secundo casu, quousque inceperint hæredes esse, est liberum tenementum, cum autem inceperint habere, incipit liberum tenementum esse feodum, et cum desierint esse, desinit esse feodum, et iterum incipit esse liberum tenementum, et ita nunquam ibi erit dotis exactio, nisi fuerit donatio pura, quia de reversione expressa nunquam fiat mentio. Notandum, quod bene poterit donator ab initio in principio donationis suæ, legem imponere donationi, et de voluntate sua rem datam exonerare, ad commodum ipsius donatorii, et contra legem terræ, dum tamen hoc non sit in præjudicium aliorum, ad quos nihil pertinet de eorum
f. 18. contractu; ut si terram dederit pro minori servitio quam illam tenuerit de domino et feoffatore suo, dum tamen factum suum warrantizare poterit de proprio, ne domino capitali præjudicetur de servitio suo, licet terram datam sibi habuerit obligatam. Poterit tamen exonerare terram datam in præjudicium sui ipsius et hæredum suorum, et remittere servitium proprium pro se, et hæredibus suis, sive servitia, sive consuetudines
Inst. II. i. § 40. Dig. L. xvii. § 195. Dig. L. xvii. 145. quascunque. Et sufficit quod hoc semel voluit, quia nihil tam conveniens est naturali æquitati, quam voluntatem domini, volentis rem suam in alium transferre, ratam haberi. Et expresso eo ad quod tenetur donatorius in charta donationis, alia omnia videntur esse remissa, quæ non specialiter sunt expressa. Expressa enim nocent, non expressa non nocent, et sic liberat charta ab onere, quæ expressa non onerat. Poterit etiam donator rem datam onerare plus et minus, servitio et servitutibus, de voluntate donatorii, et sic non præju-

if there have been at some time heirs and they have failed. But in the first case, where there has been no heir, the thing given to the donatory will always be a free tenement and not a fee. Likewise, in the second case, until heirs have begun to exist, it is a free tenement, but when they have begun to exist, the free tenement begins to be a fee, and when they have ceased to exist, it ceases to be a fee, and again begins to be a free tenement, and so there will never be an exaction of dower, unless there be an absolute donation, since there is no mention of an express reversion. It is to be noted, that a donor may well impose at the beginning, from the commencement of his donation, a law upon the donation, and of his own will may exonerate the thing given for the advantage of the donatory, and contrary to the law of the land, provided this be not to the prejudice of others, who are not at all concerned with their contract; as, if a person has given land for a less service f. 18.
than that, by which he held it from his lord, and his feoffor, provided that he can warrant his act as regards his own service, so that no prejudice shall be worked to the chief lord as respects the service due to him, although he holds the land given to him charged. But he may exonerate the land given in prejudice of himself and of his heirs, and remit on behalf of himself and his heirs his own service or services, or any customs. And it is sufficient, that he has once willed it, for nothing is so agreeable to natural equity, than to ratify the will of an owner, who is willing to transfer his own property to another. And when that, to which the donatory is bound, is expressed in the deed of donation, all other things, which are not specially expressed, seem to be remitted. For things expressed are nocuous, things not expressed are innocuous, and so a deed, which does not expressly burden, liberates from a burden. A donor also may burden more or less a donation with a service and with servitudes, according to the will of the donatory,

dicatur alicui nisi donatorio et hæredibus suis: ex quo uterque in initio donationis hoc voluit, quia volenti non fit injuria. Et sic expressa nocent donatorio, et non nocent donatori. Et sic modus donationis et conditio quandoque prodest donatorio, et quandoque nocet, et e converso. Modus autem donationis et conditio multiplex esse poterit in persona donatorii, quandoque ad commodum, ne det vel ne faciat, quandoque ad incommodum quod det vel faciat, et semper oportet servare ea, de quibus inter partes convenerit, quamvis in præjudicium legis, dum tamen hoc non sit in præjudicium aliorum. Et semper donatorius poterit facere de re data quicquid voluerit, cum sit sua omnino, nisi specialiter contineatur quod non possit. Item esto quod sic dicatur in donatione, Do tali tantam terram cum pertinentiis, etc., habendum et tenendum sibi et hæredibus suis, si hæredes habuerit de corpore suo procreatos, si tales hæredes extiterint, quamvis defecerint, generaliter vocandi sunt omnes et in infinitum, quia satisfactum est conditioni. Si autem nullus talis procreatus fuerit, semper erit res data liberum tenementum, et revertetur ad donatorem, omnibus aliis hæredibus exclusis, cum non sit conditioni satisfactum, et sic adjungitur conditio sub modo. Item fieri poterit donatio viro et uxori simul, et hæredibus uxoris tantum, per modum donationis, et eodem modo viro et uxori et hæredibus viri tantum. Item viro et uxori et hæredibus communibus, si tales extiterint, vel si non extiterint, tunc ejus hæredibus, qui alium supervixerit. Item fieri possunt donationes sub modo et adjecta conditione, ut si dicat quis, Do tali tantam terram, etc., ut

Britton, l. ii. ch. v. § 3.
Fleta, 185, 186.

and so no prejudice is worked to anyone except to the donatory himself, and to his heirs, seeing that each has intended this at the commencement of the gift, because wrong is not worked against a consenting party. And so things expressed are nocuous to the donatory and innocuous to the donor. And thus the mode and the condition of a donation sometimes profit a donatory and sometimes damage him, and conversely. But the mode and condition of the donation may be manifold in the person of the donatory, sometimes for his advantage, that he may not give or do something, sometimes to his disadvantage, that he should give or do something, and he ought always to observe those things, respecting which there has been an agreement between the parties, although to the prejudice of the [general] law, provided it be not to the prejudice of others. And the donatory may always do with the thing itself given to him what he pleases, since it is altogether his own, unless it has been specially provided that he may not do so. Likewise, let it be, that it is thus said in the donation, "I give to such an one so much " land with its appurtenances, &c., to have and to hold " to him and his heirs, if he shall have heirs procreated of his own body." If there have been any such heirs, although they have failed, they are all to be called generally, and without end, in order that the condition may be satisfied. But if there be no such heir procreated, the thing given will always be a free tenement, and will revert to the donor, all other heirs being excluded, since the condition has not been satisfied, and so a modified condition is added. Likewise, a donation may be made to a husband and a wife together, and to the heirs of the wife only. Likewise, to a husband and a wife, and to common heirs, if such exist, or if none such exist, then to the heirs of him, who has survived the other. Likewise, donations may be made with some modification and with a condition added, as if one should say, I give to such an one so much land, &c.,

det mihi tantum, vel ut inveniat mihi necessaria, talis donatio, etsi non sit omnino gratuita, tamen simplex est et pura, et si sequatur traditio, revocari non poterit, sed ille, qui tradidit, ad hoc agere poterit, quod ille, qui accipit, teneat ei conventionem, et faciat quod promisit. Si autem tali donationi sit statim conditio apposita in initio donationis, quod, nisi accipiens tradenti teneat, quod convenit, statim liceat sibi se ponere in terram illam, et tenere sibi et hæredibus suis quiete de ipso accipiente et hæredibus suis, si postmodum se posuerit in seysinam ille tradens, et ille, qui accipit, arramaverit super eum assisam novæ disseysinæ: inprimis inquirendum erit, an ille, qui tenementum accepit, invenerit tradenti ita sufficienter necessaria, quod
18 b. inde contentus esse deberet. Si autem non cadit assisa, si autem sic, per assisam recuperabit. Si autem necessaria sufficienter non invenerit, et tradens in seysinam se ponere non possit per prædictam conditionem, dabitur ei actio ex conditione, ad seysinam suam rehabendam, si vero in possessione esset, quod per se, posset se tueri in possessione sua per exceptionem conventionis. Sed quid, si ille, qui recepit tali modo, ulterius dedit terram illam alteri, cum non sit pertinens conditioni ? quæritur si ille, qui tradidit, possit talem ejicere, cum illum non tangat conditio, videtur prima facie, quod sic, quia videtur, quod ipsa res obligata sit cum persona et ad nullum transferri poterit, nisi cum suo onere, et ideo videtur, quod quamvis fuerit ejectus, et licet sine judicio, non recuperabit. Sed revera obligatio ista personalis est et inter certas personas con-

that he may give me so much, or that he may find for me necessaries, such a donation, although it be not altogether gratuitous, nevertheless is simple and absolute, and, if delivery follows, it cannot be revoked; but he who has delivered it may insist upon this, that he who has accepted it should keep his bargain, and do what he has promised. But if to such a donation a condition has been forthwith attached at the commencement of the donation, that unless the acceptor keep his bargain to the deliverer, it shall forthwith be allowable for the deliverer to put himself into that land and to hold it to himself and his heirs quietly of the acceptor and his heirs, if afterwards he who has delivered the land should put himself into seysine, and the acceptor has attempted to bring against him an assise of novel disseysine; in the first place an inquiry must be made, whether he who accepted the tenement has found for the deliverer so sufficiently what are the necessaries, which have been promised, that he ought thereupon to be content. If not, f. 18 b.
indeed, the assise fails, but if yea, he shall recover by the assise. But if he has not found sufficiently the necessaries, and the deliverer cannot put himself into seysine under the aforesaid condition, he shall have an action upon the condition to regain his seysine; but if he should be in possession, he may maintain himself in his possession by the exception of the agreement. But what if, he who has regained it in this manner, has further given the land to another, when it is not pertinent to the condition? It is asked, whether he who has delivered the land can eject such a person, when the condition does not touch him; it appears at first sight that [he can do] so, because it appears that the thing itself is charged together with the person, and can be transferred to no one, except with its charge, and therefore it appears that although a person has been ejected, and although without a judgment, he shall not recover. But in truth, such an obligation is personal, and is contracted between cer-

trahitur, nec alias personas ligat, nisi tantum illas, inter quas tantum sit contractus, nec expressum est de quo tenemento inveniri debent necessaria, non magis de isto quam de illo, et ideo tenementum non obligatur, neque oneratur. Qualiter ergo perspiciendum erit quærenti, cum sic feoffatum ejicere non possit, nec se ponere in seysinam secundum conventionem, nec contra ipsum agere ex conventione? agendum igitur erit (ut videtur) cum primo, qui decepit, ut ad minus teneatur ad interesse, si habeat unde; si autem nihil, tunc recurrendum erit ad feoffatum, de consilio curiæ et non de jure, et sic incidunt in donationem illius quatuor contractus innominati, scilicet, Do ut facias, Facio ut des, Facio ut facias, Do ut des, et sic poterit sequi donatio ex causa præcedente vel ex causa subsequente, secundum prædictos contractus, facit enim modum *ut, si* conditionem, *quia* causam; unde versus,

Britton, l. ii. ch. v. § 3. Fleta, 185. Dig. XIX. v. § 5.

"Scito quod *ut* modus est, *sic* conditio, *quia* causa."

Item poterit pluribus fieri donatio per modum, simul et successive, ut si quis plures habeat filios, et sic fecerit primogenito donationem, et dicat, Do A. primogenito filio meo tantam terram, etc. habendam et tenendam sibi et hæredibus suis de corpore suo procreatis, et si tales hæredes non habuerit, vel habuerit et defecerint, tunc terram illam do B. filio meo postgenito, et volo quod terra ad ipsum B. revertatur, habendum et tenendum sibi et hæredibus suis, quos de corpore suo procreatos habuerit, et si nullos tales habuerit, vel si habuerit et defecerint, tunc volo et concedo pro me et hæredibus meis, quod prædicta terra revertatur ad C. tertium filium meum, habendum et tenendum sibi et hæredibus suis, quos de corpore suo procreatos habue-

tain persons, nor does it bind other persons, except only those, between whom alone the covenant is made, nor is it expressed from what tenement the necessaries ought to be found, not more from this than from that, and therefore the tenement is not charged nor burdened. In what way, then, is provision made for the claimant, since he cannot eject a person so enfeoffed, nor put himself into seysine according to the covenant, nor bring an action against him upon the agreement. He will then have to bring his action (as it seems) against the first person, who has deceived him, that he may be liable at least for his interest, if he has any therein; but if he has none, then recourse must be had against the party enfeoffed, upon consultation of the court, and not of right, and so four contracts without any name are incident to that donation; for example, (1) I give that you may do; (2) I do that you may give; (3) I do that you may do; (4) I give that you may give; and so a donation may follow from a cause preceding or a cause subsequent, according to the aforesaid forms of contracting, for "as" makes a mode, "if" a condition, "because" a cause; hence the verse,—

"Scito quod *ut* modus est, *si* conditio, *quia* causa."

Likewise, a donation may be made to several persons under a mode together and severally; as, if a person has several sons, and has thus made a donation to the first-born, and says, I give to A., my first-born son, so much land, &c., to have and to hold to himself and his heirs procreated of his body, and if he have no such heirs, or has had them and they fail, then I give that land to B., my after-born son, and I will that land to revert to B., to have and to hold to him and his heirs procreated of his body, and if he have no such heirs, or has had them and they fail, then I will and grant, on behalf of myself and my heirs, that the aforesaid land shall revert to C., my third son, to have and to hold to him and his heirs procreated of his body, and so of several. And if the

rit, et sic de pluribus. Et si prædicti A., B., C. sine talibus hæredibus de corpore suo procreatis decesserint, tunc volo, quod prædicta terra revertatur ad me et ad alios hæredes meos, quod quidem fieret sine expressione, per tacitam conditionem, nisi donator aliud inde ordinaret. Item si largius fiat donatio, ut si dicatur, Do tibi tantum terræ, etc. habendum et tenendum tibi et hæredibus tuis, vel cui dare vel assignare in vita, vel in morte legare volueris, valet donatio, propter voluntatem et consensum donatoris, quamvis contra legem terræ fieri videatur, et unde si legatarius primam habuerit seysinam, si hæres petat per assisam, legatarius contra assisam, competentem habebit exceptionem de modo donationis; si autem legatarius extra seysinam
f. 19. petat ex causa testamentaria in foro ecclesiastico, obstabit ei regia prohibitio, ne judices ecclesiastici judicarent, quia non habent jurisdictionem nec coertionem ad judicium suum exequendum. Si autem in foro seculari agere voluerit, quamvis hoc sit inauditum, bene poterit, per breve formatum,[1] cum possit quis renunciare iis, quæ pro se et suis fuerint introducta, sine præjudicio aliorum. Est quædam donatio omnino sub modo, secundum quod prædictum est de quatuor generibus
Dig. XIX. v. § 5. contractuum, scilicet, Do ut des, ut si dicam, Do tibi digestum, ut des mihi codicem, et si digestum tradidero, teneris mihi ad codicem tradendum. Vel si dicam, Do tibi ut facias, id est, do tibi codicem, ut facias mihi scribi
Britton, l. ii. ch. v. § 3. digestum. Vel facio ut des, id est, facio tibi domum, ut des mihi codicem; vel facio ut facias, id est, facio
Fleta, 185. tibi aulam, ut tu facias mihi cameram, istæ donationes consistunt sub modo, et obligant contrahentes, ita quod

[1] "Breve Formatum" is a term apparently unknown to Ducange or Spelman. "Literæ formatæ" were known to the Ecclesiastical Courts, signifying Letters Dimissory or Commendatory, as the case might be.

aforesaid A., B., C. die without such heirs procreated of their bodies, then I will that land to revert to me and to my other heirs, which would be done without being expressed, under a tacit condition, unless the donor has otherwise thereupon ordained. Again, if the donation be made more extensively; as if it be said, I give you so much land, &c., to have and to hold to yourself and your heirs, or to whom you may choose to give or assign it during life, or to bequeath it after death, the donation is valid on account of the will and consent of the donor, although it may appear to be made against the law of the land, and hence, if the legatee has had the first seysine, if the heir claims it by assise, the legatee will have a competent exception against the assise from the mode of the donation; but if the legatee being out of seysine claim it in a testamentary cause in the ecclesiastical court, the king's prohibition will be in the way f. 19. to prevent the ecclesiastical judges giving judgment, because they have not jurisdiction, nor any coercive authority to execute their judgment. But if he wishes to bring an action in the secular court, although this is unheard of, he may well do so by a "*Breve Formatum*," because a person may renounce conditions, which have been introduced on behalf of himself and his heirs, without prejudice to others. There is also a kind of donation, [which is] altogether under a mode, according to what has been said concerning the four kinds of contracts; for example, I give that you may give; as if I should say, I give you a digest that you may give me a code, and if I should deliver to you a digest, you are bound to me to deliver to me a code; or, if I should say, I give you that you may do, that is, I give you a code that you may cause a digest to be written for me; or, I do that you may give, as, I make you a house that you may give me a code; or, I do that you may do, as, I make for you a hall, that you may make for me a chamber; these donations hold good under a mode, and bind the contracting parties, so that, if I shall give or

si dedero vel fecero, tu teneris ad dandum vel faciendum, secundum quod convenit, sed tamen ut repetere possim, quod dedi, si tu non vis facere, quod promisisti, si ad hoc tantum agere possum, quod tu facias, nisi aliter convenerit ab initio. Poterit enim huic donationi sub modo adjici conditio ab initio, ut si dicam, et si non dederis vel non feceris, quod convenit, quod ego repetere possum, quod dedi vel impensas factas circa rem quas feci, aliter non.

2. Si fiat donatio sub conditione.

Fieri autem poterit donatio sub conditione seu sub modo, ut si dicam, Do tibi rem istam, si ita factum sit vel non factum, et si conferatur conditio in futurum, licet præsentia et præterita non sunt in pendenti sicut futura, quia conditio in præteritum collata infirmat obligationem, vel omnino non differt. Hæc autem conditio est possibilis vel impossibilis, si autem possibilis et potestativa, ut si dicam, Do tibi talem rem, si dederis mihi decem, valet donatio, sed suspenditur, donec existat conditio. Ut si tu petas rem, excipere possum quod tu decem mihi non dederis. Item si conditio fuerit impossibilis, ut si dicam, Do tibi istam rem, si cœlum digito tetigeris, non valet donatio, et pro non adjecto habetur conditio. Item non valet donatio ab initio, sed est in pendenti in alterius potestate, collata conditione, ut si dicam, Do tibi talem rem, si Titius voluerit, vel arbitratus fuerit, vel quid tale fecerit, quia nisi hoc fecerit, donatio non valebit. Item si conditio casualis fuerit, ut si dicam, Do tibi talem rem, si navis venerit ex Asia, vel si Titius consul factus fuerit, erit donatio in pendenti, quia hujusmodi donationes dependent ex insidiis fortunæ. Si autem conditio fuerit mixta et disjunctiva, ut si in parte fuerit potestativa,

Inst. III. 16, § 6. Dig. XLV. i. § 100.

Britton, l. ii. ch. v. § 7. Fleta, 187.

Dig. XLIV. 7, § 44.

shall do, you are bound to give or to do according to the agreement, but nevertheless that I may reclaim what I have given, if you are not willing to do what you have promised, if I can only bring an action that you should do it, unless it has been otherwise agreed upon at the commencement. For a condition may have been from the commencement added to this donation under a mode; as if I should say, "and, if you should not give, or "should not do what is agreed upon, I may reclaim "what I have given, or the expenses incurred about "the thing, which I have done, otherwise not."

2. If a donation be made under a condition.

But a donation may be made under a condition or under a mode; as if I shall say, I give you that thing, if it be so done or not done, and if the condition have regard to the future, although things present and past are not pending like future things, because a condition, which regards the past, invalidates an obligation or at all events does not defer it. But this condition is possible or impossible, but if it is possible and within one's power, as if I should say, I give you a certain thing, if you give me ten things, the donation is valid, but it is suspended until the condition takes effect. As if you claim the thing, I can object that you have not given me the ten things. Likewise, if the condition be impossible, as if I should say, I give that thing, if you can touch the firmament with your fingers, the donation is not valid, and the condition is regarded as void. Likewise, a donation is not valid from the commencement, but is suspended in the power of another, a condition having been added; as if I should say, I give you such a thing, if Titius has willed, or has thought, or has done a certain thing, because unless he has done this thing, the donation will not be valid. Likewise, if the condition be contingent; as if I should say, I give you such a thing if a ship arrives from Asia, or if Titius is made consul, the donation will be in suspense, for such donations are dependent on the snares of fortune. But if the condition be mixed and disjunctive, as if it be in part

Inst. III. § 16, 4. et in parte casualis, ut si dicam, Do tibi hanc rem, si mihi decem dederis, vel si illud feceris, sufficit unum istorum adimpleri, sed si plures conditiones ascriptæ sunt donationi conjunctim, ut si dicatur, si illud et illud factum sit, omnibus est parendum, si divisim, ut prædictum est, cuilibet vel alteri eorum satis est obtemperare. Item conditionum alia expressa, et sit verbis negativis, ut si dicatur, si Titius hæres non fit, tu hæres esto, vel si tu hæredem de corpore tuo non habueris, tunc terra sic data revertatur ad tales, unum vel plures, simul vel successive. Item est quædam conditio tacita, et fit verbis affirmativis, ut si dicatur, si A. sit hæres B. te invicem substituo, id est, hæredem facio, et si unus eorum præmoriatur, vivus succedat mortuo. Item
f. 19 b. conditionum, alia duplex, ut si dicatur, si hæredes de
Britton, l. ii. ch. v. § 11. corpore tuo non habueris, vel si habueris et defecerint, tunc terra data revertatur ad me et ad hæredes meos.
Fleta, 187. Item alia simplex, et fit verbis affirmativis, ut si dicam, si habueris hæredes et infra ætatem decesserint, tunc revertatur terra illa, etc. Item alia duplex, et fit partim verbis negativis, partim affirmativis, ut si dicam, si filius meus non fuerit furiosus, vel si fuerit et infra furorem decesserit, volo quod tu hæres meus sis, et hujusmodi. Item fieri poterit donatio sub modo, pluribus adjectis conditionibus, ut si dicam, Do tibi hanc rem, ut facias tale quid, vel ne facias, et si non feceris, vel si feceris, quod terra revertatur ad me. Vel do tibi, quod non facias istam rem sine voluntate mea, et si feceris, quod possim me ponere in terram illam, et me tenere in terra illa quiete de te et hæredibus tuis,

within one's power and in part contingent; as if I shall say, I give you this thing, if you will give me ten things, or if you will do this, it is sufficient, that one of these conditions be fulfilled; but if several conditions are annexed to the donation conjointly, as if it be said, if this and that be done, they must be satisfied in all respects, [on the other hand,] if divisibly, as has been above said, it is sufficient if the one or the other be fulfilled. Likewise, there are other conditions, which are express and are made in negative words; as if it be said, if Titius should not be the heir you shall be the heir, or if you shall not have heirs of your body, then the landso given shall return to such persons, one or more, together or successively. Likewise, there is sometimes a tacit condition, and it is in affirmative words; as if it be said, if A. be the heir of B., I substitute you in turn, that is, I make you heir, and if one of them predeceases the other, the living is to succeed the dead. Likewise of conditions, some are double; as if it be said, if you have f. 19 b.
not heirs of your body, or if you have had [such] and they have failed, then let the given land revert to me and to my heirs. Likewise, another is simple and is made in affirmative words; as if I should say, if you should have heirs and they die within age, then let that land revert, &c. Likewise, another is double, and is made partly in negative words, partly in affirmative; as if I should say, if my son shall not be a madman, or if he should be such and should die whilst he is mad, I wish you to be my heir, and such like. Likewise, a donation can be made under a mode, with the addition of several conditions; as if I shall say, I give you this thing, that you may do such a thing, or that you may not do it, and if you should not do it, or if you should do it, that the land should revert to me; or, I give to you that you may not do that thing without my will, and if you should do it, that I may put myself into that land and keep myself in that land quietly as regards

et unde si cum prædictæ conditiones sive conventiones et instrumenta, in quibus continentur, deducta fuerint in judicio, non sufficit, si probentur instrumenta, conditiones vel conventiones; nisi probetur, quod satisfactum sit conditioni, vel non satisfactum; quia probato instrumento, adhuc poterit esse, quod non sit conditioni satisfactum, per veram probationem, vel saltem per præsumptionem, cui semper standum erit, donec probetur in contrarium. Item si quis ita dederit sub modo vel sub conditione, quæ ex alterius dependeat voluntate vel potestate. Verbi gratia: si quis dederit alicui advocationem alicujus ecclesiæ, ut ibi faciat prioratum et illum in proprios usus convertat, hoc sine voluntate episcopi vel alterius ordinarii adimpleri non poterit, et si illi consentire noluerint, non erit hoc imputandum donatorio, quod conditio non extiterit, et tenebit donatio, maxime cum donatorius ad hoc diligentiam adhibuerit, pro posse suo, efficacem.

3. Si fiat donatio ex facto præcedente, vel ex causa subsequente. Inst. II. 20, § 31. Dig. XXXV. i. § 72, 6.

Fit etiam donatio quandoque ex causa præcedente, et quandoque ex causa subsequente; præcedente, ut si dicam, Do tibi hanc rem, quia mihi bene servisti, et quo casu, licet talis bene non servierit, valet tamen donatio, quia falsa causa adjecta non perimit donationem, non magis quam legatum. Si autem ex causa subsequente, ut si dicam, Do tibi hanc rem, quia bene mihi servies, adhuc erit illud idem dicendum. Si autem addatur conditio in causa subsequente, erit donatio in pendenti, ut si dicam, Do tibi terram hanc, si bene mihi servieris, et pura erit et perfecta donatio, resolvitur tamen sub conditione, si servitium bonum non

you and your heirs, and thence if, when the aforesaid conditions or covenants or the instruments in which they are contained, have been brought before a judicial tribunal, it is not sufficient if the instruments are proved and the conditions and the covenants [are proved], unless it be proved that the condition has been satisfied or not satisfied, for after the instrument has been proved, it may still be possible, that the condition has not been satisfied by a true proof, or at least by a presumption, by which we must stand, until the contrary be proved. Likewise, if a person shall have so given [a thing] under a mode or under a condition, which depends on the will or the power of another. For example's sake: if anyone shall have given to another the advowson of a church, that he should make there a priory, and he should convert it to his use, this cannot be completed without the assent of the bishop or other ordinary, and if they should be unwilling to consent, it shall not be imputed to the donatory, that the condition has not been [complied with], and the donation will hold good, chiefly since the donatory has applied as much diligence, as he possibly could, to effect this.

3. If the donation be made for a fact preceding, or for a subsequent cause.

A donation, also, is sometimes made from a cause preceding, and sometimes from a subsequent cause: [from a cause] preceding, as if I should say, I give you this thing, because you have served me well, and in which case although so-and-so has not well served [me], the donation however is valid, because the mention of a false cause does not destroy a gift, any more than a legacy. But if [a donation is made] from a subsequent cause, as if I should say, I give you this thing, because you will serve me well, the same remark will apply. But if a condition is added in stating the subsequent cause, the donation will be suspended; as if I should say, I give you this land if you will have served me well, it will be an absolute and perfect donation; it is, however, put an end to according to the condition, if a good ser-

fuerit subsequutum, erit in pendenti, donec sciatur utrum existat conditio vel non existat.

4. Quod conditio impedit descensum ad proprios hæredes.

Britton, l. ii. ch. v. § 13. Fleta, 187.

Item poterit conditio impedire descensum ad proprios hæredes, contra jus commune, ut si dicam, Concedo tibi tantum terræ ad terminum decem annorum, et post terminum, revertatur ad me terra illa, et si infra terminum illorum decem annorum decessero, concedo pro me et hæredibus meis quod terra illa tibi remaneat ad vitam tuam vel in feodo, et sic facit conditio liberum tenementum et feodum, et tollit conditio hæredibus assisam mortis antecessoris, quia si illi prima facie habeant directam actionem, firmarius[1] tamen habebit ex conventione exceptionem. Item quod fuit ab initio liberum tenementum et ad vitam, per conventionem poterit mutari in terminum, ut si aliquis concedat alteri terram ad vitam, fieri poterit inter eos conditio, quod si tenens infra certum terminum obierit, quod
f. 20. hæredes tenentis, vel assignati, vel sui executores possunt terram sic datam tenere usque ad certum terminum, post mortem ipsius tenentis, et ita facit conditio de termino liberum tenementum, et e contrario, et dat exceptionem contra veros dominos et eorum hæredes. Item eodem modo dat exceptionem contra assisam novæ disseysinæ, ut supra de necessariis inveniendis, satis dictum est. Item dat exceptionem creditori contra debitorem, verum dominum et hæredes ejus, si inter eos convenerit ab initio, quod si pecunia suo die soluta non fuerit, quod terra in vadium data remaneat creditori et suis hæredibus, ut infra de assisa mortis antecessoris, de hærede Johannis Dacy. Item dat exceptionem contra veros hæredes et contra assisam mortis antecessoris, si sit qui dicat, cum peregre sit profectu-

[1] "firmarius," the termor, or tenant who has the land for a term of years.

vice has not followed, it will be [accordingly] suspended, until it be known whether the condition has been fulfilled or not.

4. That a condition hinders the descent of property to right heirs.

Likewise, a condition may impede the descent [of property] to right heirs, against the common law; as if I should say, I grant to you so much land for the term of ten years, and after the term let the land revert to me, and if I should die within the term of ten years, I grant on behalf of myself and my heirs, that the land shall remain to you for your life or in fee, and so the condition makes it a free tenement and fee, and the condition takes away from the heirs an assise on the death of their ancestor, because if on first sight they have a direct action, the termor, however, will have an exception founded on the agreement. Likewise, what has been from the commencement a free tenement and for life, may be changed by an agreement into a term; as if one should grant to another land for life, a condition may be made between them, that if the tenant die within f. 20. a certain time, the heirs of the tenant, or his assigns or his executors, may keep the land so given to the end of a certain time after the death of the tenant himself, and thus the condition makes it a free tenement for a term, and the contrary, and furnishes an exception against the true owner and his heirs. Likewise, in the same way, it furnishes an exception against an assise of novel disseysine, as has been sufficiently stated above respecting the supplying of necessaries. Likewise, it furnishes an exception to a creditor against his debtor, the true owner and his heirs, if there has been a covenant between them from the commencement, that if the (money) shall not be paid on a fixed day, that the land given in security shall remain to the creditor and his heirs, as below concerning the assise of the death of an ancestor, in the case of the heir of John Dacy. Likewise, it furnishes an exception against the true heirs, and against an assise on the death of an ancestor, if there be any one

Britton, l. ii. ch. v. § 15. Fleta, 188.

rus, Concedo A. talem terram meam ad certum terminum, sicut cruce signatorum,[1] et ita quod si rediero, restituet mihi terram meam, et si in itinere mortuus fuero, vel non rediero, remanebit A. terra illa in feodo, et si existat conditio, quod talis non redierit, et hæres petat per assisam mortis antecessoris, obstabit ei exceptio conditionis, et ita mixta erit donatio, scilicet feoffamentum cum termino, et unum habent principium, licet exitum diversum, et tunc terminus, et feoffamentum incipiunt eodem tempore, licet simul stare non possunt, nec paribus passibus incedant, unum eorum præcedit et stat, et aliud est in pendenti, quousque existat conditio vel non existat. Si autem non existat conditio, terminatur utrumque, scilicet tenementum cum termino, vel feodo, et e contrario. Si autem existat conditio, statim desinit esse terminus, et feodum vel tenementum quod ab initio incepit, et in pendenti extitit, jam firmum remanet et tenet, et terminus evanescit et e contrario, et sic nocet hæredibus antecessorum conventio ex conditione. Poterit enim quis renunciare pro se et suis juri, quod pro se introductum est, et ideo hæredi non infertur injuria, sed damnum, ex quo talis conventio placuit antecessori; quia scienti et volenti non fit injuria, et ita conditio seu conventio vincit legem. Quod autem dicitur in præcedentibus, quod potest quis renunciare pro se et suis hæredibus, iis, quæ pro se et suis hæredibus introducta sunt, non tamen potest iis, quæ pro aliis introducta sunt renunciare, secundum quod inferius dicetur, de exceptionibus,

[1] "cruce signatorum." The badge of a cross worked on a cloak was an emblem that the wearer was under a vow to make a pilgrimage to Jerusalem or Campostella, or some other holy place.

who says, when he is about to go abroad, I grant to A. such a land of mine for a certain term, as in the case of persons, who have adopted the badge of the cross, and so, that if I shall have returned, he shall restore to me my land, but if I shall die on my journey or shall not return, the land shall remain for A. in fee, and if the condition arises, that such a person has not returned, and his heir claims by an assise on the death of his ancestor, the exception of the condition shall bar him, and so the donation will be mixed; for instance, it will be an enfeoffment with a term, and they have one [and the same] beginning, although a different ending, and then the term and the feoffment begin at the same time, although they both cannot stand together, nor do they march with equal steps, but one of them precedes and stands still, and the other is pendent, until the condition takes effect or fails. But if the condition fails, each is terminated, that is, the tenement with a term, or with a fee, and the contrary. But if the condition takes effect, it forthwith ceases to be a term, and the fee or tenement, which from the commencement began and remained pending, now remains and holds firm and the term vanishes, and on the contrary, and thus the agreement of ancestors under a condition is hurtful to the heirs. A person may also renounce in behalf of himself and his heirs a right, which has been introduced on his behalf, and therefore no wrong is worked to the heir, but loss, from the time when such an agreement pleased his ancestor; because wrong is not worked against a person, who is knowing and willing, and so a condition or an agreement prevails against [the general] law. But [as regards] what has been said in the preceding words, that a person may renounce on behalf of himself and his heirs those things, which have been introduced on behalf of himself and his heirs, he cannot renounce those things, which have been introduced on behalf of others, according to what will be explained below concerning exceptions in the title on

in titulo de prohibitionibus. Item esto, quod aliquis dimiserit terram aliquam ab initio in vadium et sub conditione, ita quod, si pecunia suo die soluta non fuerit, quod terra pignori data remaneat creditori, et in hoc casu, si die suo pecunia soluta non fuerit, remanebit terra sic impignorata creditori ipsi, per creditoris conditionem, et voluntatem debitoris suppositam, et sic erit, si certa et unica dies apponatur. Sed esto, quod quis pecuniam ita credat, reddendam ad plures terminos, et quod si debitor in aliquo istorum terminorum in solutione defecerit, quod res impignorata remaneat creditori. Cessat in primo termino, paratus est tamen debitor satisfacere in ultimo termino vel ante de toto, queritur[1] an teneat conditio? videtur, quod sic, quia non satisfactum est conditioni, secundum quod convenit, quia in tempore est plus et minus, et est verum. Sed esto, quod debitor ita respondeat, quod ad diem suum venit paratus satisfacere, et pecuniam solvendam obtulit sub testimonio proborum et legalium hominum, qui hoc dicant sub testimonio visus sui, qui vide-
f. 20 b. runt pecuniam numeratam quacunque hora diei, cum tota dies cedit debitori, liberatur debitor. Et unde oportet creditorem, quod qualibet hora diei se exhibeat ad recipiendum et sui copiam faciat, et ita quod nihil sit quod sibi debeat imputari. Si autem debitor sit in mora, creditore præsente, amittet debitor, vel si præsens fuerit et pecuniam non habuerit. Idem erit sive creditor præsens fuerit, sive non. Sed quæro an creditor, pecunia suo die non soluta, statim habeat liberum tenementum; habet, si fuerit in possessione, si autem fuerit extra, habet actionem ex conventione.

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[1] "queritur" is evidently a mis-print in the edition of 1549 for "quæritur."

"prohibitions." Likewise, let it be that some one has conveyed land from the commencement as security and under a condition, so that if the money is not paid on a fixed day, the land shall remain so pledged to the creditor himself, under the condition of the creditor, and the presumed will of the debtor, and so it shall be, if a certain and single day be appointed. But let it be, that some one lends money to be paid back at several terms, and [on the condition] that if the debtor fails in payment at any of those terms, that the thing pledged shall remain with the creditor. He makes default at the first term, the debtor, however, is prepared to satisfy the whole debt at the last term or before, it is asked whether the condition is binding? It would appear in the affirmative, because the condition has not been satisfied according to the covenant, because time is of the essence of more or less, and it is true. But let it be, that the debtor so answers that he came upon the fixed day, prepared to satisfy [the debt], and offered money in payment according to the testimony of honest and loyal men, who say this upon the evidence of their own sight, that they saw the money counted out at a f. 20 b.
certain hour of the day, as the debtor has the advantage of the whole day, the debtor is thereupon released. And hence it is requisite that the creditor should show himself ready to receive [the money] at any hour of the day, and should make himself accessible, and so that there be nothing, which can be imputed to his fault. But if the debtor is in delay, when the creditor is present, the debtor shall lose, or if he be present and have not the money. The same shall result, whether the creditor be present or not. But I ask whether the creditor upon the money not being paid on a certain day has forthwith the free tenement; he has it, if he is in possession; but if he is out of possession, he has an action on his covenant.

Cap. VII.

1. Si terra data fuerit bastardo in maritagium, vel per se. Britton, l. ii. ch. iii. Fleta, 178.

Quoniam terra data bastardo in maritagium, sicut & aliis, vel bastardo per se, in se tacitam habet conditionem vel expressam de reversione: ideò videndū,[1] si terra data fuerit bastardo in maritagium cum aliqua muliere, aut datur ipsis & eorum hæredibus cōmunibus, aut hæredibus ipsius uxoris tantùm, in primo casu revertetur ad donatorem, si defecerint hæredes communes, per modum tacitum donationis. Si autem fit hæredibus uxoris, tunc si hæredes habuerit de bastardo, remanebit eorum hæredibus cōmunibus terra, quia tales erunt hæredes uxoris, quamvis communes. Si autem communes defecerint, tunc descendit terra sic data aliis hæredibus ipsius uxoris de altero viro vel à latere venientibus. Item, esto q̄ terra illa data fuerit alicui bastardo p̄ se sine uxore, & tunc addatur, ei & hæredibus suis tantùm, vel ei & assignatis suis; si ei & hæredib⁹ suis tantùm, tunc deficientibus hæredib⁹, sive homagium intervenerit sive non, erit terra illa eschaeta dominorū, p̄ defectu hæredum, & cum tali domino remanebit, non obstante homagio, quia homagiū evanescit, hæredib⁹ deficientib⁹ ubique. Si autē facta fuerit bastardo & hæredib⁹ suis vel assignatis, vel cui assignare voluerit, tunc si in vita sua terram illā assignaverit hora cōgrua & tempore cōpetenti, ac si fecerit donationē & eodē modo, valebit assignatio & donatio, quamvis hæredes de corpore suo defecerint, q̄ quidem facere non posset deficientib⁹ de corpore suo hæredib⁹ p̄creatis, nisi hoc ei p̄missum esset per cōditionem & p̄ modum donationis. Et notandum q̄ in favorem bastardorum primò inventa fuerit donatio, unde quidē sive facta fuerit donatio

Britton, l. ii. ch. iii. § 5. Fleta, 178.

[1] "videndū." The contracted words have been hitherto extended. They will be henceforth printed as in the printed editions of 1569 and 1640, which are identical.

Chapter VII.

1. If land be given to a bastard for a maritage, or for himself.

Since land given to a bastard for a maritage, as also to others, or to a bastard for himself, has a tacit condition in itself, or an expressed condition concerning the reversion, we, therefore, must see, if land shall have been given to a bastard for a maritage with a certain woman, it is given either to themselves and their common heirs, or to the heirs of the wife only; in the first case it will revert to the donor, if common heirs fail, by the tacit mode of the gift. But if it is made to the heirs of the wife, then, if she have heirs by the bastard, the land will remain to their common heirs, for such persons will be the heirs of the wife, although they are common heirs. If, however, common heirs should fail, the land so given them descends to the other heirs of the wife herself by another husband, or from a collateral source. Likewise, let it be that the land has been given to a bastard by himself without his wife, and there be then added, to him and to his heirs only, or to him and to his assigns; if it be to him and to his heirs only, then upon heirs failing, whether homage has intervened or not, the land will be an escheat of the lords through failure of heirs, and will remain with such a lord, notwithstanding the homage, for the homage vanishes, when heirs everywhere fail. But if it has been made to the bastard and his heirs and assigns, or to him to whom he may choose to assign, then if during his life he has assigned the land at a suitable hour and in competent time, as if he was making a donation, and in the same manner, the assignment and donation will be valid, although heirs of his body should fail, which he could not do, if heirs procreated from his body failed, unless it was permitted to him by the condition and by the manner of the donation. And it is to be noted, that the donation was invented first of all in favour of the bastard, and hence, indeed, whether the donation has

bastardo & hæredib^{9}, vel bastardo & hæredib^{9} & assignatis, si hæredes nō habuerit, vel assignatos hora congrua non fecerit, terra sic data, non obstante homagio, revertitur ad ipsum donatorem, & cum eo remanebit pro defectu hæredum & assignatorū.

2. De dote uxoris bastardi.

Sed de dote mulieris quid fiet in hoc casu? ex quo warrantum nō habet de dote sua, cùm nec appareat hæres nec assignatus, nec etiam legatarius, si fortè legatum fuerit, sicut in burgagiis; mulier in omnib^{9} istis casib^{9} dotem obtinebit, quāmvis warrenti[1] non existant, quia vir suus, quāvis bastard^{9}, feoffatus fuit tenendi in feodo sine aliqua contradictione, liberè & purè, & statim incipit res data esse in feodo, licèt hæredes vel assignati non existant, vel licèt extiterint & defecerint, q̄ non est in certis hæredibus expressis & nominatis; ut suprà. Sed qualiter obtinebit mulier dotem, cùm warrantum non habeat, non magis quā ille, qui[2] warrantum habere potest, cui p̄ bastardū sit donatio, deficientib^{9} hæredib^{9} & assignatis & legatariis? Respondeo q̄ ipsi amittunt p̄ defectu warranti, quāvis teneāt & sint in possessione. Sed qualiter recuperabit ipsa? cū sit extra seysinam & sine warranto, ut videtur, respondeo. Habet quasi warrantū suum, illum, ad quem terra sic data debet reverti, et maximè, eò q̄ vir suus (quāvis bastardus) feoffatus fuit purè & sine conditione tenendi in feodo, & sic existit talis warrant^{9} dotis & non donationis, & poterit ratio esse, quia ex necessitate, statim post mortem talium donatoī, revertitur res data ad donatorem, p̄ defectu hæredis, qui warrātizare deberet donum; et etiā dos, non statim, sed post tempus, & erit donator quasi hæres, & loco hæredis p̄ defectu hæredum, & in dote non erit aliqua exhære-

[1] "warrenti" and "warranti" are interchangeable in MS. Rawl., as in the text.

[2] "qui" is omitted in MSS. Rawl. and Crewe.

been made to the bastard and his heirs, or to the bastard and his heirs and assigns, if he has not had heirs, or has not made assigns at a suitable hour, the land so given, notwithstanding the homage, returns to the donor himself, and will remain with him from failure of heirs.

2. Of the dowry of the wife of a bastard.

But what will become of the dowry of a woman in this case? Since she has no warrantor of her dowry, when neither an heir nor an assign appears, nor even a legatee, if it should by chance be bequeathed, as in burgage tenures; the woman in all such cases shall obtain her dowry, although warrantors do not exist, because her husband, although a bastard, was enfeoffed of a holding in fee without any contradiction, freely and absolutely, and the thing given begins forthwith to be in fee, although there be no heirs or assigns existing, f. 21. or although they have existed, and have failed, because it is not [vested] in certain heirs expressed and named as above. But in what manner will the woman obtain her dower, when she has no warrantor, any more than he, to whom a donation has been made by a bastard, can have a warrantor, on failure of heirs and assigns and legatees? I answer that they lose from failure of a warrantor, although they hold and are in possession. But how will she recover, when she is out of seysine and without a warrantor, as it appears. I answer, that she has, as it were, her own warrantor [in] him to whom the land so given ought to revert, and chiefly for that reason, because her husband, although a bastard, was enfeoffed absolutely and unconditionally of a tenement in fee, and so there exists such a warrantor of her dower and not of the donation, and the reason may be, because from necessity the thing given forthwith after the death of such donatories reverts to the donor from want of an heir, who can warrant the gift; and [so] likewise a dowry will revert, not forthwith, but after a time, and the donor will be as it were the heir, and in the place of an heir, from failure of heirs, and in the

datio sicut in donationibus, & maximè hoc ideò, quia ad donatorem post mortem uxoris erit reversura. Item esto, quòd duobus fratribus bastardis fiat donatio de aliqua re, tunc distinguendum erit, utrum fiat illis duob⁹ simul & in cōmuni, vel cuilibet ipsoꝝ separatim & per se; si autem separatim & per se, & unus eorum moriatur sine hæredibus vel assignatis, res data revertetur ad donatorem ꝑ defectu hæredis vel assignati, quia frater bastardus omninò extraneus est ei quoad successionem, licèt nō quoad sanguinem. Si autem sic data fuerit res, tenenda in cōmuni, & si unus eoꝝ decesserit sine hærede vel assignato, frater ejus bastardus succedet ei, non quidem jure successionis, sed jure accrescendi, secundùm q̄ dicitur suprà de concubina & pueris. Si autem uterq; hæredes habuerit, omnes simul teneant in cōmuni, nisi agere velint ad divisionem & partitionem. Si autem uterq; sine hæredib⁹ & assignatis decesserit, vel si tales habuerit & defecerint,[1] sic tota res data revertetur ad donatorem.

3. Si terra data fuerit in maritagium, videndum qualiter fiat donatio in maritagium.

Quādoq; verò revertatur[2] maritagium ad donatorem, per cōditionem tacitā vel expressam; ideò consequenter dicendum est, qualiter terra dari possit in maritagium. Et sciendum, q̄ terra datur aliquando ante sponsalia, & ꝑpter nuptias, à patre mulieris, vel alio parente, ipsi marito cū muliere aliqua, vel utriq; simul, s. tali viro & uxori suæ (q̄ idem est) & eoꝝ hæredibus vel alicui mulieri ad se maritandam, vel simpliciter sine aliqua mentione maritagii, q̃ quidem donatio fieri poterit, sicut cuilibet de populo. Sed si fiat mentio de maritagio, terra sic data dici poterit maritagium. Fit

[1] "decesserint," MS. Crewe.

[2] "Quoniam vero quandoque revertitur," MSS. Rawl., Crewe, and Glas.

case of a dowry there will be no disinheritance, as in the case of donations, and chiefly for this reason, because it is intended to revert to the donor after the death of the wife. Likewise, let it be that a donation is made of any thing to two brothers, who are bastards, here we must distinguish, whether the gift is made to them both together and in common, or to each of them separately and by himself: but if, indeed, [to each] separately and by himself, and one of them dies without heirs or assigns, the thing given will return to the donor, from failure of an heir or an assign, because the bastard brother is altogether a stranger to him as regards the succession, although not as regards his blood. But if the thing has been so given to be held in common, and if one of them dies without an heir or an assign, his bastard brother will succeed him, not indeed in right of succession, but in right of accretion, according to what has been said above concerning a concubine and her sons. But if each has heirs, they shall all be tenants together in common, unless they wish to have recourse to division and partition. But if each should die without heirs and assigns, or if he has had such and they have failed, then the whole thing given will return to the donor.

3. If land has been given as a maritage, we must see in what manner a donation may be made for a maritage.

But sometimes a maritage will revert to the donor by a condition, tacit or expressed; therefore it follows that we should discuss in what manner land should be given as a maritage. And it is to be known that the land is sometimes given before spousals and in consideration of marriage by the father of the woman, or by another relative to the husband himself with a certain woman, or to each together, that is, to such a husband and his wife (which is the same), and to their heirs, or to a certain woman to get herself married, or simply without any mention of a maritage, which donation indeed may be made as to any one of the people. But if any mention is made of a maritage, the land so given may be called a maritage. For such a donation

etiam talis donatio, ante matrimonium contractum, aliquando in ipso contractu, aliquando post contractum. Est autem alia donatio, q̃ fit à viro uxori, in ipso contractu, ad ostium ecclesiæ, q̃ non dicitur propriè donatio, immo dotis nominatio, sive constitutio, secundùm quod inferiùs dicetur in tractatu, de dote. Terra vero q̃ sic datur ꝑpter nuptias, dicitur maritagium. Et est maritagium aliquando liberum, s. ab omni servitio quietum, & aliquando servitio obligatum. Liberum autem maritagium dicitur, ubi donator vult, quòd terra sic data quieta sit & libera ab omni seculari servitio, quod ad dominum feodi possit pertinere, & ita quòd ille, cui
f. 21 b. sic data fuerit, nullum omnino faciat inde servitium usq; ad tertium hæredem, & usq; ad quartum gradum, ita q tertius hæres sit inclusivus. Item liber̃ potest[1] esse ex toto quòd nullum omnino reddit servitium. Item omni servitio obnoxium, sed ubi nullum servitium remittitur. Item liberum in parte, & in parte non, ubi aliquod servitium accipitur in donatione, & aliquod remittitur; ut si quis ita tradidit in maritagium liber̃ tenementū, salvo inde forinseco servitio. Item poterit quis dare liberiùs, quam ipse tenuerit & per minus servitium, ut si ipse teneatur ad forinsecum domino & feoffatori suo, tenens ipse poterit alium inde ulteriùs feoffare sine forinseco, de toto vel de aliqua parte, non tamen limitatur districtio dominorum, quin per totum facere possunt districtionem, secundùm juris rigorem, sed de æquitate non. Ut si districtionem fecerit super feoffato, perquirat sibi feoffatus, per breve de medio, super suū feoffatorem, & interim non cessabit districtio, propter placitum de medio; quia si sic, tunc fieret injuria capitali domino. Si autem super feoffatorem, benè facit; quia ipse tenetur suo feoffato ad warran-

[1] The passage "Item liber po-test" down to "locum teneat, quam nullum" in the next page, is omitted in MSS. Rawl., Crewe, and Glas.

is made before matrimony is contracted, sometimes in the contract itself, sometimes after the contract. There is also another donation, which is made by the husband to the wife in the very contract, at the door of the church, which is not called properly a donation, but rather the nomination or the constitution of a dowry, according to what will be said below on the subject of dower. But land, which is so given in consideration of nuptials, is called a maritage. And a maritage is sometimes free, that is, released from all service, and is sometimes burdened by a service. But a maritage is called free, when the donor wishes that the land so given should be released and free from all secular service, which may pertain to the lord of the fee, and so that he, to whom it has been given, shall f. 21 b. make no service therefrom down to the third heir and even to the fourth heir, so that the third heir be inclusive. Likewise, it may be free altogether so as to render no service at all. Likewise, [it may be] liable to every service, when no service is remitted. Likewise, free in part, and in part not, when some service is reserved in the donation and some is remitted; as if a person shall have delivered a free tenement as a maritage, reserving from it a forinsec service. Likewise, a person may give a thing more freely than he has held it and by a less service, as if a person be bound to his lord and feoffor to [perform] a forinsec [service], the tenant himself may further enfeoff another therewith, without the forinsec [service], either of the whole or of a certain part, the distraint of the lords is not, however, limited, so as not to be able to destrain for the whole according to the rigour of the law, but not by equity. As if he should make a distraint upon the feoffee, the feoffee will make a claim against his feoffor, by an intermediate writ: for if it were so, then injustice would be done to the chief lord. But if he claims against the feoffor, he does well, because he is bound to the

tiam. Itē esto, quòd dominus capitalis sui tenentis confirmaverit feoffamentum, si tunc districtionem fecerit super suum feoffatum, feoffatus habebit defensionem suam in manu sua, scilicet confirmationem. Si autem super feoffatorem tenentem suum, licèt ipse nihil habeat in manu ad defensionem suam, si tamen petit servitium ab eo, quod remiserit suo feoffato, & sic esset confirmatio inefficax, si ab uno posset petere quod alteri remisit. Et unde dicere poterit feoffator, quòd ipse respondere non teneatur; quia ex quo dominus capitalis suum factum & donum confirmavit, faciendo aliquid contra, illud non poterit infirmare, quia confirmatio suum supplet defectum; et ita quòd nullus eorum tenebitur, ut confirmatio magis valeat quàm pereat, et quòd potiùs locum teneat, quàm nullū. Gradus[1] verò computandi sunt, à primo donatorio, usq; ad tertium hæredem inclusivum; ut donatorius faciat primum gradum, & hæres suus faciat secundum, & hæres hæredis tertium, et hæres secundi hæredis quartum, qui quidem tenebitur ad servitium, & facta computatione de hæredibus, filius vel filia donatorii erit primus hæres, filius vel filia talium erit secundus, & filius vel filia secundi hæredis erit tertius hæres, qui tenebitur ad homagium & servitium faciendum, & ita quòd donatorius & duo hæredes successivè tali gaudent libertate. Et videtur quòd homagium ideò fieri non debet, propter reversionem ad donatorem, si hæredes defecerint. Sed quid si à tertio hærede fit homagium, & ipse vel hæredes sui sine hæredibus decesserint, videndum erit, an alii sint hæredes, qui vix deficiunt infra quartum gradum, & si tales extiterint, ad eos revertetur maritagium pro defectu hæredum in recta linea descendentium. Si autem nullus talis inveniatur, vel si fuerit & defecerit, tunc pro defectu omnium illorum ad donatorem revertetur

[1] "Gradus." Here commences again the text of MSS. Rawl., Crewe, and Glas.

feoffee to warrant him. Likewise, let it be that the chief lord has confirmed the enfeoffment of his tenant, if he shall then make a distraint upon his feoffee, the feoffee will then have his defence in his own hand, forsooth the confirmation. But if he [shall distrain] upon the feoffor, his tenant, although the latter has nothing in his hand for his defence, if, however, he seeks a service from him, which he has remitted to his feoffee, and so the confirmation would be ineffective, if he could seek from one what he has remitted to the other, therefore the feoffor may say, that he is not bound to answer, because since the chief lord has confirmed his act and gift, he cannot invalidate it by doing anything to the contrary, because the confirmation makes good any defect; and so none of them will be held bound, so that the confirmation shall rather hold good than fail, and that it shall rather maintain its place than otherwise. But degrees have to be computed, from the first donatory even to the third heir inclusive: that the donatory constitutes the first degree, and his heir the second, and the heir of the heir the third, and the heir of the second heir the fourth, who, indeed, will be bound to service, and if a computation of the heirs is made, the son or daughter of the first donatory will be the first heir; the son or daughter of the latter will be the second heir; and the son or daughter of the second heir will be the third heir, who is bound to do homage and service, and that the donatory and two heirs successively enjoy this liberty. And it seems that homage should not be done by him for this reason, because of the reversion to the donor, if heirs should fail. But what if homage be done by the third heir, and he or his heirs die without heirs, we must see if there may be other heirs, who rarely fail within the fourth degree, and if such exist, the maritage will revert to them from failure of heirs descending in the right line. But if no such heir be found, or if he shall have existed and should have failed, then from failure of

maritagium, & pro defectu hæredum evanescit homagium. Item esto, quòd fiat homagium ante tertium hæredem, quæritur an extunc teneatur ad servitium? et verum est, quòd sic, ut probatur de termino Sancti
f. 22. Mich. anno regni regis H. 15 incipiente 16 comitatu de Salop̃ de Rogero de la Suche & Petronilla de Wyneslogh, quia servitiū semper sequitur homagium, quamvis hoc sit ad dānū solventium. Et quid si in initio donationis liberii maritagii nulla sit charta confecta, q̃ in se contineat warrantizationē expressam, nec homagiū sit fact', nec servitium, nec contingat donatorium implacitari & hæredes suos, si donatorem maritagii & feoffatorem suū vocaverit ad warrantū, quæritur an warrantizare debeant, sine charta & homagio? et veř est q̧ sic, quia fœmina p̧ donatorē sic maritata, vel ejus pueri vel hæredes, si ipsa obierit, erunt p̧ charta, et sufficiunt p̧ charta.

Britton, l. ii. ch. viii. § 5.
Fleta, 197.

4. Maritagium aliud liberum, aliud non.

Est autem maritagium servitio obligatum & oneratum, q̧ non est liberum, ut si donator sic dederit, retento sibi & hæredibus suis servitio debito, & sic fiet servitium debitum sive homagium, usq̧ ad tertium hæredem, & terti⁹ hæres extunc faciet homagium cum servitio, de hærede in hæred̄. Sed ante homagium factum & usq̧ ad tertium hæredem in utroq̧ casu faciet vir fidelitatem, et ejus hæredes, vel uxor donatorii, dum fuerit sine viro. Liberum autem maritagium dici poterit, dum tamen fiat inde servitium tale quale. Item nihilominùs dici poterit liberum, licèt inde solvantur præstationes communes, q̃ non pertinent ad dominum feodi, sed ad regem. Item nihilominùs dici poterit liberum, si inde præstentur auxilia rationabilia, sicut de filiabus maritandis, & de filio faci-

all of them, the maritage will revert to the donor, and from failure of heirs, the homage expires. Likewise, let it be, that homage is performed before the third heir, it is asked, if he is then bound to service? and it is true that it is so, as is proved in the term of St. Michael in the fifteenth year of King Henry, at the beginning of f. 22. the sixteenth, in the county of Salop, [in the case] of Roger de la Suche and Petronilla de Wyneslogh, for service always follows homage, although this may be to the loss of those who perform it. And what, if at the commencement of a gift of free maritage no deed has been made, which contains in itself an express warranty, and homage has not been performed nor service, and it happens that the donatory is impleaded and his heirs; if he shall call the donor of the maritage and his own feoffor to warrant, it is asked whether they are bound to warrant without a deed or homage? and it is true that it is so, because a woman so maritaged by a donor, or her sons and heirs, if she should have died, will be [maritaged] by a deed, and are sufficiently [so] by a deed.

4. A maritage is either free, or not.

But a maritage is bound and burdened with a service, so that it is not free, as if the donor shall have so given [it], having retained for himself and his heirs a due service, and so the service will be due or the homage even to the third heir, and the third heir will thenceforward do homage with the service from heir to heir. But before doing homage and down to the third heir in each case, the husband and his heirs will do fealty, or the wife of the donatory, provided she is without a husband. But a maritage may be termed free, provided that some kind or other of service is performed for it. Likewise, it may not the less be termed free, although common contributions are paid for it, which do not pertain to the lord of the fee, but to the king. Also, it may be termed free, if reasonable aids are forthcoming from it; as to marry the daughters, or to make the son a knight, which pertain to persons who

endo militem, quæ. pertinent ad personas, q̃ liberè tenent, & non tenementum, quod tenetur liberè. Item dari poterit terra ante matrimonium & post, tam viro pro se & hæredibus suis, quàm uxori pro se & hæredibus suis, quã utrisq; & hæredib⁹ suis communibus, à patre, vel matre, vel alio parente uxoris, unde si contingat partitionē fieri inter uxorē & sorores ej⁹ participes, vel earum hæredes de cōmuni hæreditate, in partitione facienda, non venit in divisionē terra data viro per se: quia ipse feoffatus est, sicut quilibet de populo, & ideò cōtribuere non tenetur. Sed terra data tā viro quā uxori, vel uxori per se, cōtribui debet (secundꝺ quosdā) & indistinctè, q̄ ego non approbo,[1] cum mentio non habeatur de maritagio, & ꝑ eo q̄ vulgaritèr dicitur, q̄ maritagium cadit in partem. Videtur ergo, q̄ non aliud, quam id quod datur ratione maritagii & affectione, & ideò de facili dicere possit quis, q̄ donatio simplex & pura cadit in partem, sicut maritagium, q̄ quidem non dicitur. Restat ergo inquirendum, ut videtur, utrum terra sic data, ad minus, uxori ante matrimonium, data sit tali de causa, scil. ad se maritandam, vel sicut cuilibet de populo, & quòd nulla sit spes maritagii, vel ob spem maritagii, & secundùm hoc cadet donatio in partem, vel non cadet. Diversimode verò datur terra in maritagium cum uxore, ut si dicat donator, do tali filiæ meæ tantā terram ad se maritandum, nulla facta mentione de hæredibus, videtur, q̄ talis donatio tantùm sit liberum tenementum & non feodum, & quòd se non extendat ad hæredes, & unde sive liberos habuerit, sive non, videtur statim, q̄ post

[1] "ego non approbo." If the author of the work was one of the king's justiciaries, the language here used would be appropriate to his office. MSS. Rawl. and Crewe read "approbabo," MS. Glas. "approbo."

hold freely, and not to the tenement, which they hold freely. Likewise, land may be given before matrimony and after it, as well to the husband for himself and his heirs, as to the wife for herself and her heirs, as well as to both and their common heirs, on the father's side, or on the mother's side, or from some other relative of the wife, whence, if it happens that a partition be made between the wife and her sisters as co-partners of it, or their heirs in respect of a common inheritance, in making the partition, the land given to the husband by himself does not come into division, because he has been enfeoffed as one of the people, and therefore is not bound to contribute. But land given to the husband, as well as to the wife, or to the wife by herself, ought to make contribution (according to some) and without any distinction, which *I do not approve*, when no mention is made of maritage, and for that reason, which it is commonly stated, that a maritage comes into partition. It seems, therefore, that nothing else, than that which is given by reason of maritage and by affection [falls into partition], and therefore one may easily say, that a simple and absolute donation comes into partition, like a maritage, which, indeed is not said. It remains, therefore, to inquire, as it seems, whether land so given at least to the wife before matrimony, has been given her for this very reason, namely, to get herself married, or as to any one of the people, and that there was no expectation of a maritage; or on account of an expectation of a maritage, and accordingly the donation will come into partition or not. But land is given as a maritage in divers manners with a wife, if the donor says, I give to such my daughter so much land for her to get married, no mention being made of heirs, it seems that such a donation is only a free tenement and not a fee, and that it does not extend to heirs, and hence, whether she has had children or not, it appears that it ought to return immediately to the

mortem talis mulieris, sive maritata fuerit sive non, reverti debeat ad donatorem, nec ad hæredes descendet, nec cum primo viro vel secundo per legem Anglicanam
f. 22 b. remanebit, vel si ita data fuerit, scil. ad se maritandam, & tenendum sibi & hæredibus suis generaliter, licet de corpore suo nullos habuerit, alii remotiores vocantur ad successionem. Si autem hæredes de corpore suo habuerit, tales aliis præferuntur, dum tamen terra remaneat primo vel secundo marito ad vitam, per legem Anglic.[1] Si autem terra sic data fuerit in maritagium, sibi & certis hæredibus suis, cum coarctatione, scilicet, qui de carne sua procreati fuerint, si tales defecerint, statim revertetur terra data ad donatorem pro defectu hæredis, omnibus aliis hæredibus exclusis. Si autem sic data fuerit, tam viro quàm uxori & eorum hæredibus communibus, tales intelliguntur esse hæredes, qui de corporibus utriusque ipsorum communiter fuerint procreati, omnibus aliis hæredibus separatis, & à successione exclusis. Et ideò, si uxor à primo viro filiam procreaverit, & de secundo filium, filia ex primo viro in successione præferri debet filio ex secundo viro procreato, quod quidem esse non deberet, si terra data esset uxori tantùm & hæredibus de corpore suo procreatis, & istis omnibus deficientibus, revertetur terra data ad donatorem, omnibus aliis exclusis, ut prædictum est.[2] Item dari poterit terra in maritagium tam viro quàm uxori, & habendum tenendum predictis viro & uxori, & hæredibus viri tantùm, in quo casu vocantur omnes, tam alii hæredes ipsius viri, quos habuerit ex alia uxore, quā remotiores. Si autem sic data fuerit, viro & uxori & hæredibus uxoris tātùm, tunc vocantur ad

[1] "legem Anglic." is the contraction of the edition of 1549. "Angl." is the reading of MSS. Rawl. and Crewe.

[2] "ut prædictum est" is omitted in MS. Rawl., but it occurs in MS. Crewe.

donor after the death of that woman, whether she have been married or not, nor shall it descend to heirs, nor shall it remain with the first husband, or the second by the law of England ; or if it shall have been so given, for instance, to get herself married, and to hold to herself f. 22 b. and her heirs generally, although she should have none of her own body, others more remote are called to the succession. But if she shall have heirs of her own body, they are preferred to others, provided, however, that the land remain to her first or second husband for life, according to the law of England. But if the land shall have been given to her as a maritage, to herself and certain of her heirs, with a limitation, namely, to those who are procreated of her body, if such heirs should fail, the land given shall forthwith revert to the donor from failure of heirs, all other heirs being excluded. But if it be so given, as well to the husband as to the wife, and to their common heirs, those are understood to be the heirs, who have been procreated in common from the bodies of both of them, all other heirs being separated and excluded from the succession. And therefore if a wife has brought forth a daughter by her first husband, and a son by the second husband, the daughter by the first husband ought to be preferred in the succession to the son procreated by the second husband, which ought not to be the case, if the land were given to the wife only and the heirs procreated of her body, and upon all of them failing, the land given will revert to the donor, to the exclusion of all others, as has been said previously. Likewise the land may be given for a maritage to the husband as well as to the wife, to have and to hold to the aforesaid husband and wife, and to the heirs of the husband only, in which case all are called, as well the other heirs of the husband himself, whom he had from another wife, as the more remote. But if it be so given to the husband and wife and the heirs of the wife alone, then there are called to

successionem tam hæredes uxoris de tali viro, sive masculi sive fœminæ, quàm de alio viro, & remotiores, dum tamen masculi fœminis præferantur. Si autem sic fiat donatio, viro & uxori & eorum hæredibus, de communibus hæredibus dici intelligitur, s. de corpore ipsoꝝ procreatis simul & progenitis & conjunctim. Item esto, quòd talis fiat donatio, ut si dicat, do tali viro tantam terram cum pertinentiis pro homagio & servitio suo, habendum & tenendum sibi & hæredibus suis, & incontinenti adjiciat in charta istam clausulam, s. in liberum maritagium cum filia mea, videtur quòd ista duo simul stare non possunt, cùm sint sibi ad invicem repugnantia, quia inde sequitur, quòd in primo casu debeat terra sic data remanere viro & hæredibus suis quibuscunque: & in secundo casu, tam uxori quàm viro, & eorum hæredibus communibus & conjunctim, et si tales hæredes non habuerint, quòd terra sic data reverti debeat ad donatorem ex tacita conditione, & pacta incontinenti apposita insunt contractibus, & legem dant eis & illos infirmant. Quæritur igitur, cui parti standum erit? quidam dicunt quòd homagium præferri debet, cùm sit primus & principalis contractus, & maritagium sit quasi accessorium. Alii verò dicunt, quòd maritagum debet præferri, ut videtur, quia terra data est propter affectionem mulieris, & occasione maritagii, & videtur q primum pactum debeat per posterius elidi: sed melius est, ut videtur, quòd homagium preferri debeat, quod multis rationibus doceri poterat. Item si dicatur, do tali tantam terram per modum donationis, ut filiam meam ducat in uxorem, vel per conditionem, si filiam meam duxerit in

the succession, as well the heirs of the wife from such a husband, whether males or females, as those from another husband and the more remote, provided always that the males are preferred to the females. But if the donation be thus made, to the husband and to the wife and to their heirs, it is understood that common heirs are meant, that is heirs procreated together and born of their bodies and conjointly. Likewise let it be, that such a donation is made, as if he should say, I give to such a man so much land with the appurtenances for his homage and his service, to have and to hold for himself and his heirs, and should forthwith add in his deed this clause, that is, "in free maritage with my daughter," it seems that these two [clauses] cannot stand together, since they are repugnant to one another, because it thenceforth follows, that in the first case the land so given ought to remain to the husband, and to his heirs whomsoever; and in the second case to the wife as well as to the husband, and to their common heirs and conjointly, and if they have not such heirs, that land so given ought to revert to the donor from a tacit condition, and covenants forthwith added are inserted in the contracts, and set law to them and invalidate them. It is asked then, by which part we are to abide? Some say that homage ought to be preferred, since the contract is the first and the principal [thing], and the maritage is as it were accessory. But others say, that the maritage is to be preferred, as it appears, because the land has been given from affection to the woman, and on the occasion of a maritage, and it seems that the first contract ought to be set aside by the later contract: but it appears to be the better [opinion] that homage ought to be preferred, which may be supported by many reasons. Likewise, if it be said, I give to such a one so much land by way of donation, that he may take my daughter for his wife, or under a condition, if he will take my daughter for his wife, and if he, to whom such

uxorem, & si ille, cui talis facta fuit donatio, illam
f. 23. non duxerit, vel ad alia vota convolaverit, competit donatori repetitio, etsi perfecta fuerit donatio, quia terra ex causa data, & causa non est sequuta. Et unde si donator, postquam talis aliam duxerit, illum statim ejiciat, ejectus per assisam novæ disseysinæ non recuperabit, incontinenti enim ejici videtur in ipso contractu, vel post contractum, & post seysinam, infra triduum vel quartum diem, vel aliquantulum ulteriùs, sed cum causa. De hac materia habetis de itinere Abbatis de Rading & M. de Pateshull in comitatu Leycestriæ. Assisa novæ disseysinæ, si Robertus filius Martini. Sed non erit ita, si talem duxerit in uxorem, ut convenit, licet postmodum inter eos celebretur divortium, cùm sit modo & conditioni satisfactum. Sed alio modo competit repetitio, & hoc apparet, secundum quod tales hæredes habuerint, vel non habuerint. Hæc de maritagio ad præsens sufficiunt exempli causa. Quoniam aliquando revertitur maritagium ad donatorem pro defectu hæredum, sive homagium intervenerit sive non, videndum igitur, qualiter revertatur, tam de maritagiis quàm de aliis terris datis pro homagio & servitio. Et sciendum, quod quandoque fit reversio ad donatorem pro defectu hæredum, per modum tacitum vel expressum, ut si terra data fuerit in maritagium, vel bastardo. Item per conditionem tacitam vel expressam, tacitam, ut quamvis, in hujusmodi donationibus nulla facta sit mentio de reversione, oportet tamen ex necessitate, quod res data revertatur ad donatorem, cum jus merum non habeat alius, ad quem descendat, & res sic reversa cum donatore remanebit, quia homa-

a donation has been made has not married her, or has paid his addresses in another quarter, the donor is entitled to reclaim it, although the gift should be complete, because the land has been given for an object, and the object has not been attained. And hence if the donor shall have ejected him forthwith after he has married another, the party ejected shall not recover by an assise of novel disseysine, for he seems to be ejected forthwith in the very contract, or after the contract, and after the seysine, within the third or the fourth day, or some little time later, but with an object. On this matter you have a case in the Iter of the Abbot of Reading and Martin de Pateshull in the county of Leicester: "An Assise of Novel Disseysine, if Robert the "son of Martin." But it will not be so, if he should have married so and so for his wife, as agreed upon, although afterwards a divorce has been solemnized between them, since in manner and in condition [the] contract has been satisfied. But in another manner a claim for restitution is admissible, and this is apparent according as such persons have had, or have not had heirs. These [observations] upon maritage are sufficient for the present for the purpose of example. Since a maritage sometimes reverts to the donor from failure of heirs, whether homage has intervened or not, we must see in what manner it reverts, as well as regards maritage as other lands given for homage and service. And it is to be known, that sometimes a reversion takes place to the donor from failure of heirs, through a tacit or expressed mode, as if land has been given for a maritage or to a bastard. Likewise through a tacit or expressed condition; a tacit [condition, for instance], as although in such donations there is no mention of a reversion, it necessarily results, that the thing given must revert to the donor, since no one else has the full right to whom it can descend, and the thing after such reversion will remain with the donor, because f. 23.

gium, si prius intervenerit, evanescit, nec ille ad quem res sic revertitur, hæres erit donatorii (& de hac materia inveniri poterit, de termino sancti Michaelis anno regni Henrici tertio, incipiente quarto, in comitatu Bedeforde, de Richardo le Hare), nec ut hæres, vel quasi, nec pro hærede, nec loco hæredis, nec factum donatorii warrantisabit aliquo casu, nisi tantùm dotis constitutionem, & hoc non in omni casu, nisi cùm sit pura donatio, & non conditionalis nec modalis, ita quòd expressè revocetur. Item revertitur terra data non pro defectu hæredum tantùm vel assignatorum, sed pro defectu hæredum vel assignatorum, de quibus nulla fit mentio in donatione, quod res data ad ipsos descendat. Item revertitur terra data ad donatorem pro defectu hæredum, qualitercunque tenentes feoffati fuerunt, purè vel sub conditione, vel alio modo, si omnino nullus hæres appareat, & cum donatore remanebit. Et si dubitetur an sit hæres, eodem modo, donec sciatur si hæres sit, & quis sit hæres, & in hoc casu erit donator pro hærede. Item revertitur ad donatorem terra data, non pro defectu hæredum, sed quòd jus & successio descendere non poterit ad hæredes, propter impedimentum perpetuum, sicut pro felonia antecessoris, de qua convictus fuerit aliquo genere convictionis, & talis terra remanebit cum donatore, ut eschaeta sua, & ille donator, ad quem sic revertitur, habebitur loco hæredis ad warrantisandum omnia, quæ felo gessit eant feloniam, dum voluit & potuit; dum tamen perfecta fuerit ante feloniam; sicut donatio, vel ad terminum dimissio, quæ omnia firma erant & rata, & irritari non poterunt, licèt de termino videatur, quòd sic; quia

Britton, l. ii. ch. vi. § 1.
Fleta, 191.
Britton, l. ii. ch. vi. § 2.
Fleta, 189.
f. 23 b.

the homage, if it has previously intervened, is extinguished, nor will he, to whom the thing so returns, be the heir of the donatory (and on this subject a case will be found in Michaelmas term in the third year of king Henry, at the commencement of the fourth, in the county of Bedford, concerning Richard le Hare), nor as the heir, nor as it were the heir, nor as representing the heir, nor in the place of the heir, nor will he warrant the act of the donator in any case, except only the constitution of dower, and this not in every case, except when it is an absolute donation, and not conditional, nor modal, so that it may be expressly revoked. Likewise the land given reverts not only from failure of heirs or of assigns, but from failure of heirs or of assigns, of whom there is no mention in the donation, that the thing given should descend to them. Likewise the land given reverts to the donor from failure of heirs, in whatever manner the tenants have been enfeoffed, absolutely or under a condition or in some other mode, if altogether no heir appears, and it shall remain with the donor. And if it be doubted whether there is an heir, in the same manner, until it is known if there be an heir, and who is the heir, and in this case the donor will be the representative of the heir. Likewise the land given reverts to the donor, not from failure of heirs, but because the right and the succession cannot devolve to heirs, on account of a perpetual impediment, as by reason of the felony of an ancestor, of which he has been convicted by any kind of conviction, and such land will remain with the donor, as his escheat, and that donor, to whom it so reverts, will be accounted the substitute of the heir to warrant every thing, which the felon did before the felony, as long as he had the will and the power, provided it was completed before the felony, as a donation or a lease for a term, all which things were firm and ratified and could not be rendered f. 23 b.
vain, although, as respects the term, it seems that [it

videtur, quòd firmarius warrantum non habeat de termino suo, sicut dici poterit de custodia. Sed re vera tenet talis dimissio, quia dominus capitalis non intrat ut custos, sed ut dominus, & loco hæredis. Ea verò, quæ ante feloniam incepta fuerunt, & non perfecta, sed in faciendo, sicut in promissionibus, & obligationibus, & dotis constitutionibus, non valent post convictionem & condemnationem. Ea verò quæ post feloniam facta sunt, vel imperfecta in faciendo, nunquam valebunt post condemationem, nec tenebitur donator ad warrantizandum, licèt sit loco hæredis in quibusdam. Et sicut res sic data esse poterit eschaeta donatoris in dominico, eodem modo poterit ei esse in homagio & servitio, quia medio inter ipsum & tenentem tenentis sui sublato de medio, & loco cujus oportet eum succedere, velit nolit, quia homagium & servitium recusare non poterit, & sic erit loco hæredis ei, cui succedit, licèt vulgaritèr dicatur, quòd quilibet poterit feodum suum wayviare; sed hoc intelligendum erit cum distinctione, quòd si quis alium feoffaverit de C. libratis terræ per servitium unius denarii, terra sic data erit feodum donatoris, quia inde feoffat, & similitèr erit feodum feoffati, quia ipse inde feoffatus est, tenendi [1] in feodo sibi & hæredibus suis, & unde habito respectu ad feoffatum, feoffatus benè poterit wayviare feodum suum, cùm hoc sit ad commodum sui feoffatoris, & ad proprium incommodum suum. Feoffator autē hoc facere non potest, quia, si ita esset, quòd posset wayviare feodum suum pro minimo servitio, nunquam warrantiam faceret suo feoffato. Cùm igitur feoffator medius hæreditatem suam forisfecit, succedet ei, loco hæredis, suus feoffator superior, velit nolit, et loco hæredis defendet eum, quem

[1] "tenendi." This is probably an erroneous extension of the contraction "tenend." which should be read "tenendum."

might be] so, because it appears that the termor has not a warrant of his term, as may be said of guardianship. But indeed such a lease holds [good], because the chief lord does not enter as a guardian, but as lord and in place of the heir. But those things, which were begun but not completed before the felony, and were in the course of being done, as in promises or in obligations, and in constitutions of dower, are not valid after [conviction. But those things which have been done after the felony, or were incomplete in the doing, will never be valid after the condemnation, nor will the donor be bound to warrant them, although he is in the place of the heir in some respects. And as a thing so given may be an escheat to the donor in demesne, in the same manner it may be so in homage and in service, because the intermediate person between himself and the tenant of his tenant being removed from between them, and in whose place he ought to succeed, whether he will or not, because he cannot refuse homage and service, and so he will be in the place of an heir to him to whom he succeeds, although it be commonly said, that any person may waive his own fee; but this is to be understood with a distinction, that if any one has enfeoffed another with one hundred pounds worth of land for the service of one penny, the land so given will be the fee of the donor, because he enfeoffs with it, and in like manner it will be the fee of the feoffee, because he is enfeoffed with it to be held in fee to him and his heirs, and thence regard being had to the person enfeoffed, the feoffee may well waive his fee, since it is for the advantage of the feoffor, and for his own disadvantage. But the feoffor cannot do this, for if it were so, that he could waive his fee for a minimum service, he could never make a warrant to his feoffee. When therefore the intermediate feoffor has forfeited his inheritance, his superior feoffor will succeed to him in place of the heir, whether he will or not, and in the place of the

ille defēdere tenetur, cujus loco succedit, quia sicut tenementum succedere possit tenenti in dominico, ita poterit servitium, nec illud wayviare possit non magis quàm ipsum tenementum. Sed esto q quis alium feoffaverit per certum servitium, s. p decem, & ille feoffatus alium ulteriùs feoffaverit per minus servitium, s. p quinq, quæritur an principalis feoffator habere debeat servitium ei debitum, s. decem, & nihilomin° quinq, sicut eschaeta, & sic utrūque, vel tantum alterum, decem vel quinq. Item esto è contrario, quòd principalis feoffaverit per minimum servitium, & ille feoffatus alium per majus servitium, rigor juris vult q habeat utrumq, quia unum est eschaeta, & aliud est debitum ppter suum feoffamentum, & obligatur tenementū. Sed ita injustè gravaretur tenens, si teneretur ad utrūq, cum suus feoffator tenetur eum defendere, cujus loco succedit dominus capitalis superior. Æquitas tamen sibi locum vendicat in hac parte, quòd dominus non sit in damno, quin ad minus habeat suum plenum servitium, computato cum minori servitio, s. quinq in quantitate decem. Si autem è contrario dominus p minus servitium, s. p quinq & suus tenens p majus servitium feoffaverit, dominus ratione eschaetæ habebit majus servitium ut eschaetam, computato minori, s. quinq in majori servitio tenentis, s. decē, cuj° loco succedit. Quia sicut plures sunt hæredes de hærede in hæred, f. 24. ppinqui & remoti, ita plures possūt esse tenētes p plura feoffam̃ successivè de teñte in tenenť & plures dñi capitales superiores, erūt dñi ultimi feoffati. Sed tamē quid erūt ppinquiores, & quid remotiores, usq, ad primū feoffatorē ascēdēdo, & ita plures erūt teñtes capitalis

heir will defend him, whom he, to whose place he succeeds, is bound to defend, for as a tenement may succeed to the tenant in demesne, so may a service, nor can he waive it any more than the tenement itself. But let it be, that some one has enfeoffed another for a certain service, for instance, for ten pieces, and the feoffee has further enfeoffed another for a less service, for instance, for five pieces, it is asked whether the principal feoffor ought to have the service due to him, for instance, ten pieces, and nevertheless five pieces as an escheat, and so both, or only one of them, the ten or the five. Likewise let it be the contrary case, that the principal has enfeoffed for the least service, and the feoffee [has enfeoffed] another for a greater service, the rigour of the law requires that he should have both, because one is an escheat and the other is due to him for his enfeoffment, and the tenement is charged [with it]. But the tenant would in this manner be unjustly burdened, if he was held to both, since his feoffor is bound to defend him, to whose place the chief lord, his superior, succeeds. But Equity asserts for itself a place in this part, that the lord may not be damnified, at least that he may have his full service, the minor service, for instance, of five pieces, being computed in the quantity of ten pieces. But if, on the contrary, the lord shall have enfeoffed [the land] for the less service, that is for five pieces, and the tenant has enfeoffed it for a greater service, then by reason of the escheat he shall have the greater service as an escheat, the less, that is five pieces, being computed in the greater service of the tenant, that is ten pieces, to whose place he succeeds. Because as there are several heirs from heir to heir, near and remote, so there may be several tenants by several f. 24.
sucessive enfeoffments from tenant to tenant, and several superior chief lords of the last lord enfeoffed. But nevertheless some will be nearer, and some more remote up to the first feoffor in an ascending line, and so there will

dñi, primi feoffatores gradatĩ descendendo usq; ad ultimũ. Et sic erũ tenẽtes ꝑpinqui & tenẽtes remoti. Itẽ revertitur terra ad donatorẽ ꝑ restitutionẽ, ut si tenẽs reddiderit et restituerit dño tenemẽt̃ suũ vel si illud weyviaverit,[1] q̃ benè facere potest, imppetuũ, & sic solvitur & evanescit homagiũ, & tale tenemẽtũ remanere poterit cũ donatore, homagio nõ obstãte. Itẽ revertitur terra data ad donatorẽ, nõ ꝑ defectu hæredis, vel ꝑpter feloniam, sed sicut ad hæredẽ ꝓximũ feoffati, ut si pater cõmunis ante mortẽ suã feoffaverit filiũ suũ mediũ, vel frater antenat^{9} fratrẽ suũ post natũ, & talis obierit sine hærede de se, terra data revertitur ad feoffatorẽ, fratrẽ ante natũ, uno modo sicut eschaeta, ꝑ defectu hẽredũ fratris sui postnati de corpore suo, alio modo sicut hæredi fratri suo, & antenato. Sed quoniã homagium nõ evanescit nec extinguitur, cùm sint alii hæredes cognati vel fratres, nec primogenit^{9} ꝑpter homagiũ poterit esse hæres & dominus, cũ homagiũ expellat dominicum & retineat servitiũ, terra sic data remanere nõ poterit cum donatore, si sit hæres ei ꝓximus, qui petat, si autem null^{9} sit omnino, vel null^{9} qui petat, terra cum tali feoffatore remanebit. Itẽ si quis alium feoffaverit, & ille idem secũdum, & secund^{9} tertiũ, & ita in infinitũ, & ille ultimò feoffatus primũ feoffatorẽ, tale feoffamẽtum stare nõ poterit, nõ magis quã si quis alium feoffaret de aliqua terra, ꝑ homagio & servitio suo, & ille idem feoffatus eundẽ feoffatorẽ suum, quia sic esset simul & semel de eodem tenemento domin^{9} & tenens, q̃ esse non potest, magis quàm dñs & hæres. Om̃ẽ autẽ reversionẽ

[1] "wayviaverit," MS. Crewe; "weviavertt," MS. Rawl.

be several tenants of the capital lord, the first feoffor, descending gradually to the last. And so there will be tenants near and tenants remote. Likewise the land returns to the donor by restitution, as if the tenant has given back and restored to the lord his tenement, or if he has waived it, which he may well do, in perpetuity, and so the homage is released and is extinguished, and such a tenement may remain with the donor, the homage notwithstanding. Likewise the land given returns to the donor, not from failure of an heir, or on account of felony, but as to the next heir of the first feoffee, as if a common father before his death has enfeoffed his intermediate son, or the first-born brother [has enfeoffed] his after-born brother, and such [feoffee] has died without an heir from himself, the land given reverts to the feoffor, the first-born brother, in one manner as an escheat, for failure of an heir to the after-born brother of his own body, in another manner as to his heir, being his brother and born before him. But since the homage does not vanish, nor is extinguished, as there are other heirs, cognates or brothers, nor can the first born on account of the homage be at the same time the heir and the lord, since homage expels the domain and retains the service, the land so given cannot remain with the donor, if there be a next heir to him, who can apply for it, but if there be none who can apply for it, the land will remain with that feoffor. Likewise if a person has en feoffed another, and the said feoffee a second, and the second a third and so on without end, and the last feoffee [has enfeoffed] the first feoffor, such an enfeoffment cannot stand, no more than if a person has enfeoffed another with certain land in consideration of his homage and service, and the said feoffee has enfeoffed the same person his feoffor, because he would thus be together and at the same time the lord and the tenant of the same tenement, which cannot be any more than he can be lord and heir. But a confirmation, made

īpedit cōfirmatio, facta ab eo qui donū alicuj[9] poterit infirmare, & eodē modo homagiū, & servitiū receptū ab eodē, & sine cōfirmatione. Idē est, s. q̄ īpeditur reversio, si aliquis feoffat[9] fuerit ab eo, qui feoffare nō potest, tenēdi de eo, qui donationē revocare poterit, & ipse homagiū tale ceperit & servitiū, nō potest donationē infirmare: sec[9] si donator homagiū retinuerit & servitiū atturnaverit[1] vero dño p̄ se p̄ manum donatorii.

Cap. VIII.

1. Si servis fieri possit donatio. Britton, l. ii. ch. vii. § 1. Fleta, 194.

Videndum est etiā an servis fieri possit donatio, sicut liberis, ad q̄ inprimis videndum est, utrum servi sub potestate dominorum suorum fuerint constituti, vel extra potestatem, & in statu liberi,[2] & hoc sive sint manumissi, sive fugitivi. Itē utrum fuerit donatio facta à domino, sub cujus potestate fuerint, vel ab alio. Si autē à domino, tunc utrum cum charta & sine charta[3] & manumissione, & libertate p̄cedente, vel sine, & tūc utrum sibi tātùm, vel sibi & hæredibus suis. Si autem à dño, sub cujus potestate fuerit, & præcesserit libertas cum manumissione, valet donatio, ac si facta esset donatio cuilibet alii de populo, sive hoc fiat cum charta, vel sine: Dum tamē homagium īterv enit, nō tamē nocet si īterveniat utrūq̄, quia quāvis dicatur,
f. 24 b. quòd servus liberum tenementum habere non posset,[4] tamen defenditur in possessione, ut si feoffator & suus[5] dominus petat, & habeat prima facie actionem, servus habet cōtra actionem domini sui competentem excep-

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[1] "attornaverit," MSS. Rawl. and Crewe.

[2] "statu liberi," MSS. Rawl. and Crewe.

[3] "et sine charta" omitted in MS. Rawl. and Crewe.

[4] "possit," MSS. Rawl. and Crewe.

[5] "suus et," MSS. Rawl. and Crewe.

by him, who can invalidate the donation of any body, impedes all reversion, and in the same way homage and service received by the same person, and without confirmation. The same thing results, namely that a reversion is impeded, if any one shall have been enfeoffed by him, who has not power to enfeoff, to be held of him who may revoke the donation, and he himself has accepted homage and service, he cannot invalidate the donation; otherwise if the donor has retained the homage and attourned the service to the true lord instead of himself by the hand of the donatory.

Chapter VIII.

1. If a donation can be made to serfs.

We must consider whether a donation can be made to serfs,[1] as to free persons, in regard to which we must in the first place consider whether the serfs are placed within the power of their lords or are beyond it and are in *status* free, and this whether they have been manumitted or are fugitives. Likewise whether the donation has been made by the lord, within whose power they are, or by another person. But if by the lord with a deed, and without a deed and manumission and liberty preceding, or without [a deed] and then whether to him alone or to him and his heirs. But if [the donation has been made] by the lord within whose power he is, and liberty with manumission has preceded, the donation is valid, as if the donation had been made to any one else of the people, whether this be done with a deed or without: provided, however, homage has intervened, it is not however hurtful, if each should intervene, because although it is said, that a serf cannot have a free tenement, he is however maintained in possession, as, if the feoffor and his lord claims, and has at first sight an action, the serf has a competent exception against the f 24 b.

[1] Britton discusses this question with reference to "vileyns."

tionē, & actionem,[1] si dominus eum ejecerit contra factum suum, & cum servus petat, dominus excipiat de servitute, servus habet competentem replicationem de facto domini. Item, si in charta contineatur, & sine manumissione expressa, habendum & tenendum liberè, quietè & pacificè, sibi & hæredibus suis, licèt homagiū nō intervenerit, innuitur p hujusmodi verba & vehementer p̃sumitur, q̱ donator voluit eum esse liberum, cui donatum est. Si autē in charta hoc tantùm contineatur, habendum & tenendum tali (cùm sit servus) p̱ libeř servitium, hujusmodi verba non faciunt servum libeř, nec dant ei libeř tenem̄tum. Est enim longè aliud tenere liberè, & aliud tenere p̱ liberum servitium, quia quamvis quis teneat p̱ liberum servitium, non tamen p̱pter hoc tenet liberè, quia tenementum q̱ conceditur villano, tenendum per libeř servitium, non facit villanum liberum, nisi teneat liberè, non magis quā villenagium facit libeř hominē villanum, si liber homo teneat p̱ villanas consuetudines, quia tenementum nihil confert, nec detrahit personæ, nisi præcedat, ut dictum est, homagium vel manumissio, vel q̱ tantundem valet de concessione domini, scilicet q̱ villanus liberè teneat et quietè & per liberum servitium, sibi & hæredibus suis. Si autem hoc solùm dicatur, quòd teneat per liberum servitium, sibi & hæredibus suis, si ejectus fuerit, à quocunq̱, non recuperet per assisam novæ disseysinæ, ut libeř tenementum, quia domino competit assisa & non villano. Si tamen dominus ipsum ejecerit, quæritur an contra dominum agere possit de conventione, cùm prima facie non habet personam standi in judicio, ad hoc, quòd dominus teneat ei conventionem, videtur q̱ sic, p̱pter factum domini sui, ut si agat de conventione, & dominus excipiat de servitute, repli-

Britton, l. ii. ch. vii. § 192.
Fleta, 193.

[1] "actionem" omitted in MSS. Rawl. and Crewe.

action of his lord; and an action, if his lord shall eject him against his own act, and when the serf claims, should the lord except on [the grounds of] serfage, the serf has a competent replication upon the act of his lord. And if it be contained in the deed and without an express manumission, "to have and to hold freely, qui-"etly, and peacefully to himself and his heirs," although homage should not intervene, it is implied by these words and is strongly presumed, that the donor wished him to be free, to whom the donation has been made. But if this only is contained in the deed, "to have and to "hold to such a one (when he is a serf) by free service," words of this kind do not make a serf free, nor give to him a free tenement. For it is far different to hold freely, and to hold by free service, for although a person hold by free service, he does not on that account hold freely, for a tenement, which is granted to a villein to be held by free service, does not make the villein free, unless he holds freely, no more than a villein tenement makes a free man a villein, if a free man holds by villein customs, because the tenement adds nothing to and detracts nothing from the person, unless, as above said, homage or manumission has preceded, or because there is an equivalent effect by the grant of the lord, namely that the villein shall hold freely and quietly by free service, to himself and his heirs. But if this only be said, that he shall hold it by free service, to himself and his heirs, if he shall be ejected by any one, he may not recover it by an assise of novel disseysine as a free tenement, because the lord, and not a villein, may have an assise. If, however, the lord shall have ejected him, it is asked whether he can bring an action against the lord upon an agreement, since at first sight he has no *persona standi* in court, on this ground, that the lord has an agreement with him, and it seems so, on account of the act of his lord, so that if he bring an action on an agreement, and the lord except on the ground of serfage, he

care poterit de facto domini sui, sicut supra dicitur de feoffamento. Nec debent jura juvare dominum contra voluntatem suā, quia semel voluit conventionē, & quamvis damnum sentiat, non tamen fit ei injuria, & ex quo prudenter & scienter contraxit cum servo suo, tacitè renunciavit exceptionē villenagii, nec poterit eum tueri ignorantia, si fortè p̃tendat quòd nescivit ipsum esse villanum, tēpore cōtractus, quia scivit, aut scire debuit, cujus fuit conditionis ille, cùm quo contraxit, utrum videlicet servus vel liber, servus p̱prius vel alienus, &
Dig. L. 16, § 19. utrum sub potestate sua, vel extra constitutus. Item esto, quòd servo facta sit donatio à domino, ut prædictum est, pro homagio[1] & servitio, & cum manumissione vel sine, vel per id quod tantundem valet, ut prædictum est, & ille idem dominus alii dederit homagia & servitia eorū, quæro an talis illos ejicere & disseysire potest, cùm non sit ibi factum suum nec feoffamentum, & verum est quòd non potest, non magis, quàm ille, qui donationem fecit, quia, cùm loco ejus succedat, non potest plus juris clamare, quam ille posset, cui succedit, & ipse extraneus est, quantum ad tales feoffatos, & ideò de jure non competit ei exceptio villenagii, & si sit, qui dicat q̱ competat, obstabit ei replicatio de facto sui feoffatoris.

2. Si fiat donatio servo sub potestate domini. f. 25.

Si servo alicujus sub potestate domini constituto facta fuerit donatio, benè valet, & tenet, quamdiu domin[2], sub cuj[2] fuerit potestate, hoc ei permiserit, & unde si fuerit disseysitus p̱ feoffatorē suum, vel p̱ alium, ad quem non pertinet, cōpetit ei restitutio p̱ assisam, contra feoffatorem suum, p̱p̃ factum suum & cōtra

[1] "pro homagio" down to "prædictum est" omitted in MS. Crewe.

may found a replication on the act of his lord, as has been said above concerning enfeoffment. Nor ought rights to help the lord against his own consent, because he has once consented to an agreement, and although he suffers a loss, no injury is done to him, and since he has intentionally and knowingly contracted with his serf, he has tacitly renounced the objection of villenage, nor can ignorance protect him, if perchance he should pretend that he did not know him to be a villein at the time of the contract, because he knew or ought to have known of what condition the person, with whom he contracted, was, whether for instance a serf or a free person, his own serf or another man's serf, and whether within his own power or placed beyond it. Likewise let it be, that a donation is made to a serf by his lord, as has been said above, in consideration of homage and service, and with manumission or without, or with that which is equivalent, as has been said above, and the very same lord has given to another their homage and services, I ask whether such a person can eject and disseyse them, since there is neither his act nor his enfeoffment in it, and it is true that he cannot do it, no more than he who made the donation, for since he succeeds into his place, he cannot claim more right, than he, to whom he succeeds, possesses, and he is a stranger as far as regards those feoffees, and therefore of right the objection of villenage cannot be raised by him, and if there be any one, who says it may be raised, the replication upon the act of his feoffor will bar him.

2. If a donation be made to a serf who is within the power of his lord. f. 25.

If a donation be made to the serf of any one placed within the power of his lord, it is perfectly valid, and holds good, as long as the lord, within whose power he may be, permits him [to enjoy it], and hence if he be disseysed by his feoffor or by another, to whom he does not belong, he may have restitution by an assise against his feoffor on account of his own act, and against the other, to whom he does not belong, and who

Britton, l. ii. ch. vii. § 3. Fleta, 194.

alios, ad quos non ptinet, & quib^{9} de jure non competit exceptio villenagii. Et quid si domin^{9} servi, in cuj^{9} fuerit potestate, servū suum ejiciat, qui se dicat esse liberum, & proclamat in libertatē, cùm servus sit? hic fiat discussio p parentelā servi pductā, tam ex parte domini, quàm ex parte servi, si autem serv^{9} fuerit extra potestatē domini, aliud erit, quia tunc nō respondebit serv^{9} ad exceptionē status sui, nisi velit sponte, antequā fuerit restitutus p assisam novæ disseysinæ, & ita q primò habeat statū suum, & posteà agat dominus de statu servi, & non priùs. Poterit enim quis esse servus unius, & liber homo alterius, respectivè tamē, quamvis dicatur, q quilibet aut liber est aut servus, nec p parte liber, nec p parte serv^{9}. Et non solùm cōpetit servo sic feoffato assisa novæ disseysinæ contra prædictos, sed etiam hæredib^{9} suis, cùm post mortē ej^{9} semel extiterint in possessione, & quousq; seysinam habuerint cōpetentem, cōpetit eis assisa mortis antecessoris versus omnes, præterquā cōtra verum dñm, sub cujus fuerint potestate, quia cōtra ipsum non tenet assisa novæ disseysinæ, nec mortis antecessoris, quia licèt servus, sub potestate constitutus, prima facie habeat querelā vel actionem, dominus cōtra ipsum habet cōpetentem exceptionem servitutis, & servus nullā replicationem. Sed quare non habet dñs assisam novæ disseysinæ statim, cum servus sub potestate sua cōstitutus tenementū acquisierit, ex quacunq; causa ejiciatur?[1] cùm dicatur q, quicquid p servum acquiritur, id dño acquiritur; & unde videtur q statim, ex quo servus est in possessione, q dñs p eum possidet,

Britton, l. ii. ch. vi. § 4. Fleta, 194.

[1] "ejiciatur" omitted in MSS. Rawl. and Crewe.

of right are not entitled to raise an objection of villenage. And what if the lord of the serf, within whose power he may be, ejects his serf, who says that he is free, and asserts a claim to liberty when he is a serf? here a discussion would arise, through the parentage of the serf being introduced, as well on the part of the lord as on the part of the serf, but if the serf be beyond the power of his lord, it will be different, because then the serf will not answer to the objection of his *status*, unless he wishes of his own free will, before he has been reinstated by a writ of novel disseysine, and so that he first have his *status*, and afterwards the lord may bring his action concerning the *status* of the serf, and not beforehand. For a person may be the serf of one man, and the free man of another, respectively however, although it be said that each person is either a free man or a serf, and not partly a free man, and partly a serf. And not only is a serf so enfeoffed entitled to an assise of novel disseysine against the aforesaid persons, but likewise his heirs are [so entitled], when after his death they have once been in possession, and until they have obtained competent seysine, they are entitled to an assise on the death of an ancestor against all persons, except against the true lord, within whose power they may have been, because against him neither an assise of novel disseysine nor an assise on the death of an ancestor holds [good], because although a serf placed within the power [of any one], has at first sight a [right of] complaint and of action, the lord is entitled to an objection of serfage against him, and the serf is not entitled to a replication. But wherefore has not the lord an assise of novel disseysine forthwith, when the serf placed within his power has acquired a tenement, from whatever cause he may be ejected? since it is said whatever is acquired by a serf is acquired for his lord, and thence it seems that as soon as a serf is in possession, that the lord possesses through him, and therefore, if the serf is ejected, his lord

& ideò si serv^{9} ejiciatur, q̄ dñs p̄ eum sit ejectus. Item q̄ p̄ servum acquiritur, id dño acquiritur, etiam nescienti & ignoranti, & adhuc dormienti. Ad quod inprimis videndum erit, utrum serv^{9} p̄quisitum fecerit nomine suo p̄prio, vel nomine domini sui. Si autē nomine domini sui, & ad opus domini stipulatus fuerit, & cōtraxit, id statim acquiritur domino p̄ servum, sicut p̄ p̄curatorem suum, & quandocunq̄ servus ejectus fuerit, statim cōpetit assisa domino & non servo. Si autem, vice versa, stipulat^{9} sit servus sibi ipsi, & non dño, id nō statim acquiritur domino, quāvis illud sit sub voluntate & potestate sua, antequā dñs apprehensus fuerit possessionē. Quod quidem impunè facere poterit, si voluerit, p̄pt̄ exceptionem, quæ ei cōpetit, & cōtra quam in hoc casu nulla cōpetit replicatio, dum tamen ipse domin^{9} faciat feoffatori servi sui in homagio [1] & servitiis & aliis, q̄ serv^{9} facere teneretur. Et cùm domin^{9} seysinā ita habuerit de manu sua, poterit restitutionem facere servo vel ali^{9} [2] tenendū liberè vel in villenagio, & extunc cōpetit domino assisa novæ disseysinæ, vel nō cōpetit, secūdum q̄ sic vel sic. Cum autē villan^{9} sub potestate cōstitutus, sic seysit^{9} moriatur, antequā domin^{9} man^{9} apposuerit, poterit esse cōtētio int̄ dñm servi & feoffatorē, cuj^{9} illorū debeat esse eschaeta tenemēntū sic p̄ servū acquisitū, & videtur q̄ non poterit esse eschaeta domini, quia serv^{9} non de eo tenuit,
f. 25 b. sed de suo feoffatore. Itē nec eschaeta feoffatoris, cùm serv^{9} feoffat^{9} liber sit, & habeat hæredes quātum ad suum feoffatorē, p̄pt̄ suum factū & feoffamentum, & unde, si primò feoffator se posuerit in seysinā, dñs servi nullā habebit versus eum actionē, hæredes tamē feoffati habebunt assisam mortis antecessoris, & cùm p̄

[1] "homagiis," MS. Rawl. | [2] "alii," MSS. Rawl. and Crewe.

is ejected through him. Likewise what is acquired by a serf, that is acquired for the lord, although knowing nothing and ignorant of it and as yet sleeping. Wherefore in the first place it is to be seen, whether the serf has made the acquisition in his own name or in the name of his lord. But if he has stipulated and contracted in the name of his lord, and for the use of his lord, that is forthwith acquired to the lord through his serf, as through his procurator, and whenever the serf should be ejected, the lord and not the serf is entitled to an assise. But if on the reverse the serf has stipulated for himself and not for his lord, it is not forthwith acquired for the lord, although it be under his will and power, before the lord has obtained possession, which he will be able to do with impunity, if he wishes, on account of the exception to which he is entitled, and against which in this case no replication can be made, provided the lord himself do to the feoffor of his serf in homage and services and other things, what the serf would be bound to do. And when the lord has thus had seysine from his own hand, he can make restitution to his serf or another, to be held freely or in villenage and thenceforth the lord is entitled to an assise of novel disseysine or is not, according as it so or otherwise. But when a villein placed within the power [of his lord] dies so seysed, before the lord has applied his hand, there may a contention between the lord of the serf and the feoffor, to which of them the tenement so acquired by the serf ought to be an escheat, and it seems that it cannot be the escheat of the lord, because the serf did not hold it of him, but of his feoffor. Likewise it is f. 25 b.
not the escheat of the feoffor, since the serf enfeoffed is free, and his heirs, as regards his feoffor, on account of his own act and enfeoffment, and hence if the first feoffor has put himself into seysine, the lord of the serf will have no action against him, but the heirs of the feoffee will have an assise of the death of an ancestor,

assisam recuperaverint, tunc erit illud tenemētum in voluntate dñi, sicut priùs fuerit tēpore mortis antecessoris. Et sciēdū, ꝙ in hoc casu cōtra omnes cōpetit assisa mortis antecessoris in ꝑsona hæredū, cōtra quos cōpeterit assisa novæ disseysinæ in ꝑsona antecessoris: si autē in vita antecessoris se poneret dñs servi in seysinā, & feoffator miserit se in possessionē post mortem, dñs habebit assisam novæ disseysinæ, salvo tamē feoffatori servitio suo debito. Sed quid, si hæres fuerit infra ætatē? quis habebit custodiā & maritagium, cùm sic possit dñs carere servo suo? ex præmissis poterit veritas beṇè ꝑpendi. Itē esto, ꝙ plures sint domini, & serv^{9} sit cōmunis, si cōtrahat & stipuletur, quæro cui istorū dominorum, utrum uni vel ambob^{9}? Respondeo, si uni tantùm, ipse totum habeat, si ambobus, tunc cōmune erit, secundùm ꝙ serv^{9} fuerit stipulatus. Et quid si sibi ipsi stipuletur? tunc refert, quis eorum se priùs posuerit in seysinā, & utrum unus vel ambo, vel omnes, & secūdùm hoc, &c. Sed, semꝑ ratio habenda est, de parte dominorum. Itē esto,[1] ꝙ servus donationem fecerit de eo, ꝙ ei datum est, tunc distinguendum, ut suprà, utrum serv^{9} tenuerit ut liberum tenemētum, vel ut villenagiū, quia si ut villenagium, dño cōpetit repetitio, sed si liberū tenemētū, tunc nec ei, nec dño suo, quia tenet ꝙ actū est, & dñs sibi imputet ꝙ tantū expectavit, (de servitio autē restat quærēdū) & sic cōstat, ꝙ, qui sub potestate alteri^{9} fuerit, dare poterit. Sed qualiter hoc? cùm ipse, qui ab aliis possidetur, nihil possidere possit. Ergo videtur ꝙ nihil dare possit, quia

Britton, l. ii. ch. vii. §§ 5, 6. Fleta, 194.

[1] "Item quæro, esto," MS. Rawl.; "Item esto," MS. Crewe.

and when they have recovered by the assise, then that tenement will be at the will of the lord, as it was before at the time of the death of the ancestor, and it is to be known, that in this case an assise of the death of an ancestor will be available in the person of the heirs against all, against whom an assise of novel disseysine would be available in the person of an ancestor. But if during the life of an ancestor the lord of a serf puts himself into seysine, and the feoffor has sent himself into possession after his death, the lord will have an assise of novel disseysine, saving always to his feoffor his service due to him. But what if the heir be under age? who will have the custody and maritage, since the lord may so be without his serf? the truth can well be arrived at, from what has been premised. Likewise let it be, that there are several lords, and the serf is common to them, if he contracts and stipulates, I ask, for which of those lords, whether for one or for both? I answer, if for one alone, he will have the whole, if for both, then it will be common to them, according as the serf has stipulated. And what, if he stipulates for himself, then it will be of importance, who of them has first put himself into seysine, and whether one or both, or all, and according to this, &c. But account is always to be taken on the part of [both] lords. Likewise let it be, that a [serf has made a donation of that, which has been given to him, then a distinction must be taken as above, whether the serf has held it as a free tenement, or as a villenage, for, if as a villenage, the lord is entitled to reclaim it, but if as a free tenement, then neither he nor his lord [may reclaim it], because, what has been done, holds good, and the lord may blame himself, that he has waited so long (but the question remains as to the service), and thus it is clear that he who is under another person's power, may give [a thing]. But in what manner [can he do] this? since he who is possessed by others, cannot possess any thing. There-

non potest quis dare, q̄ non habet, & nisi fuerit in possessione rei dandæ. Respondeo, dare potest, qui seysinam habet qualēcunq;, & servus dare potest, & quandoq; irritari possit donatio, & quandoq; nō, secundū rationē præmissā.

3. Si fuerit donatio ei qui fuerit extra potestatem domini.

Dictū est suprà quid juris, si donatio facta fuerit ei, qui est sub potestate dñi, nunc autem dicendū quid juris, si fiat illis donatio, qui fuerint extra potestatē, sicut fugitivis, vel servis extra villenagiū natis, & cui acquiritur res data, & possessio; & sciendū est q̄ servo, & si dñs eum ejecerit sine judicio, dicunt quidā, q̄ nō cōpetit servo restitutio p̄ assisā, quia si cōpetit ei actio, obstabit ei agenti exceptio servitutis. Sed revera, si cōtra ipsum excipiatur, replicare poterit de manumissione, vel q̄ excipienti non cōpetit exceptio servitutis. Itē excipere poterit de privilegio. Itē excipere poterit, q̄ est in statu libero, & si de statu suo ageretur, haberet responsiones & exceptiones cōpetentes, quib⁹ se tueri posset in statu suo libero. Oportet igitur ante oīa, de statu cognoscere, & corp⁹ disrationare, & tunc habeat dñs quicquid sequitur corp⁹, vz. sequelā, sicut pueros & catalla, & tenementa, q̄ quidem priùs fieri non potest; q̄ si priùs fieri possit, quare deducerentur catalla in judicium, p̄ breve de nativis, si de statu agatur? cùm dicat breve, q̄ vic.[1] faciat habere tali talē nativū & fugitivū suum cum sequela sua, & catallis suis, & si, antequàm corpus disrationaret, sine judicio sibi usurparet terras & catalla,

Britton, l. ii. ch. vii. § 6. Fleta, 194.

[1] "vic.," *i.e.*, vicecomes.

fore it appears that he can give nothing, for a person cannot give anything which he has not, and unless he be in possession of the thing to be given. I answer, he can give who has any kind of seysine, and a serf may give, and sometimes the donation may be voided and sometimes not, according to the reason premised.

3. If a donation be made to a serf, who is beyond the power of a lord.

It has been said above, what is the [rule of] law, if a donation is made to him, who is under the power of a lord; now we must discuss, what is the [rule of] law, if a donation is made to those, who are beyond the power of a lord, as to fugitives or to serfs born out of villenage, and for whom the thing given and the possession is acquired; and it is to be known, that it is acquired for the serf, and if the lord has ejected him without a judgment, some say that the serf is not entitled to restitution by an assise, for if he were entitled to [bring] an action, the objection of serfage will stand in his way. But in truth, if an objection be raised against him, he may make a replication on [the ground of] manumission, or that the objector is not entitled to make objection on the ground of serfage. Likewise, he may object on [the ground of] privilege. Likewise, he may object that he is of a free *status*, and if his *status* is put in question, he will have answers and competent objections, by which he may defend himself in his free *status*. It is requisite therefore before all things to take cognisance of his *status*, and to deraign the person, and then the lord may have whatever follows the person, namely, his following, such as boys, chattels, and tenements, which indeed could not be done before; which, if it could be done before, wherefore should the chattels be brought into judgment by a writ concerning natural born serfs, if the *status* be in question? when the writ says, that the viscount should cause such a one to have his natural born and fugitive [serf] with his following and his chattels, and if before he deraigns the person, he shall assume to himself without a judgment lands and chattels, when he claims his

ei petenti servum suum per breve, in causa status, obstare posset exceptio spoliationis, ita quòd petens nunquam audiretur ante plenam restitutionem catallorum & tenementorum. Et q̃ tenementum contineri possit sub generalitate catallorum, quātum ad dominum, videtur, quia ex catallis illorum servorum, (quæ dominorum esse debent,) empta sunt tenementa, cùm igitur dominis non competat exceptio villenagii cōtra eos, qui sunt extra potestatē, si replicetur, multo fortiùs nec eis cōpetit, qui nihil juris habent in servis, neq̃ in catallis. Et sicut non poterit quis servū suū fugitivū, dum fuerit in statu libero, disseysire, quia recuperet p̃ assisam, antequam corpus habeat sub sua potestate, cum petatur in servitutem sicut de servis fugitivis, licèt sunt servi; ita nec possunt liberi sub potestate dominorum constituti, ut servi, qui dici poterunt statu servi, assisam portare, si fuerint disseysiti, nec habent[1] recuperare, antequam se docuerint esse liberos, si proclament in libertatem. Dictum est[2] in curia regis, coram justic. de banco apud Westm̃, p̃ Johannem de Metingham, & socios suos justic. ibidem, q̃ si nativus alitus fugitivus fuerit & extra potestatē domini sui, sive infra civitates, sive antiquum dominicū regis, vel alibi, et reversus fuerit, & invent[9] in fundo servili ubi traxit originē, & cōprehensus à vero domino suo ibidē vel à suis, quasi avis in nido, hoc p̃bato, si talis illud dedicere velit in curia regis, imperpetuū serv[9] erit. Infrà plus de hac materia, de assisa novæ disseysinæ. Itē tenementū non mutat statum liberi, non magis quàm servi. Poterit enim liber homo tenere purū villenagiū, faciendo quicquid ad villenagiū p̃tine-

[1] "habent" omitted in MSS. Rawl. and Crewe.

[2] "Dictum est" to "imperpetu-" um servus erit" omitted in MSS. Rawl. and Crewe.

serf by a writ in a cause of *status*, an objection on the ground of spoliation may be in the way, so that the claimant would never be heard before a full restitution of the chattels and of the tenements. And it appears that a tenement may be contained under the general term "chattels," as far as the lord is concerned, because from the chattels of those serfs (which ought to belong to the lords) the tenements have been bought; since, therefore, the lords are not entitled to an objection of villeinage against those, who are beyond their power, if a replication be made, much more are they not entitled, who have no right in the serfs nor in the chattels. And as a person cannot disseyse his own fugitive serf, provided he is of a free *status*, because he would recover by an assise, before he has his person under his power, when he is claimed into serfage, as in the case of fugitive serfs, so neither can free persons placed within the power of lords as serfs, who may be termed serfs by *status*, bring an assise if they should be disseysed, nor have they any title to recover, before they have shown themselves to be free persons, if they make claim to liberty. It was determined in the King's Court before the Justices of the Bench in Westminster by John de Metingham and his associate justices at the same time, that if a natural born homefed [serf] shall be a fugitive and beyond the power of his lord, either within cities or within the ancient demesne of the crown or elsewhere, and he has returned and has been found in a servile farm, where he had his origin, and has been seized there, like a bird in its nest, by his true lord or his agents, if this be proved, if such a person attempts to deny this in court, he shall be a serf in perpetuity. Below [there will be] more in this subject concerning an assise of novel disseysine. Likewise a tenement does not change the *status* of a free man any more than that of a serf. For a free man may hold a pure villenage, by doing whatever may pertain to the villenage, and nevertheless he f. 26.

bit, & nihilominùs liber erit, cùm hoc faciat ratione villenagii, & nō ratione ꝑsonæ suæ, & ideò poterit, quādo voluerit, villenagiū deserere, & liber discedere, nisi illaqueatus sit ꝑ uxorem nativam ad hoc faciendū, ad quam ingressus fuit in villenagiū, & quæ præstare poterit impedimentum. Est enim purum villenagiū, à quo præstatur servitiū incertum & indeẽminatū, ubi sciri non poterit vesperè, quale servitium fieri debet manè, vz., ubi quis facere tenetur, quicquid ei præceptum fuit. Item non mutat statum liberi villanum socagiū, non magis quàm liberum. Sed quamvis de villano socagio fiat certū servitium, ꝑꝑ̃ hoc non habebit liberum tenementum, (ad hoc facit [1] suprà de dominico domini regis ꝑ totum,) quia hoc facit ratione tenementi, licèt non ratione ꝑsonæ. Utrumq; tamen tenere poterit ꝑ certa servitia & expressa, ex cōventione tamē, ad vitam vel in feodo, & quo casu cōventio & cōsensus dominorū facit ei liberum tenementū, quāvis opera faciant servilia, tallagia, & alia, cùm sint certa & determinata. Merchetum verò ꝑ filia dare, non cōpetit libero homini, inter alia, ꝑꝑ̃ liberi sanguinis privilegium, & unde in dominicis domini regis distinguendum erit inẽ liberos & villanos sockmannos, qui in dominico domini regis nati sunt, & ab antiquo tenuerūt in villenagio; & puros villanos, & illos qui adventicii sunt, & tenuerint ꝑ certa servitia & expressa, ex cōvētione, quāvis ad similitudinē villanorū sockmānorū,

Britton, l. i. ch. xxxii. § 3.

[1] "ad hoc facit" down to "per totum" omitted in MSS. Rawl. and Crewe.

will be free, since he does by reason of the villenage and not by reason of his person, and accordingly he can, whenever he pleases, abandon the villeinage, and depart free, unless he should be entangled through a natural born [villein] wife to do this, to whom he has paid his court within the villenage, and who might have raised an impediment. For that is an absolute villenage, from which an uncertain and indeterminate service is rendered, where it cannot be known in the evening, what service is to be rendered in the morning, that is where a person is bound to do whatever is enjoined to him. Likewise a villein sockage does not change the *status* of a free person, any more than a free [sockage]. But although from a villein sockage a certain service is rendered, he shall not have on that account a free tenement (what has been said above respecting the domain of the king throughout the whole makes for this), because he does this [service] by reason of the tenement, and not of the person. He may, however, hold both by certain and expressed services under an agreement, however, for life or in fee, in which case the agreement and the consent of the lords make it a free tenement for him, although he does servile services, tallages and other things, since they are certain and determinate. But to give blood ransom[1] for a daughter is not permissible to a free man, because of the privilege of free blood, and hence in the demesnes of the lord the king, a distinction is to be made between free and villein sockmen, who are born in the demesne of the lord the king and have held from ancient time in villenage, and [on the other hand] pure villeins and those who are adventitious and have held by certain and express services, under an agreement,

[1] "Merchetum" or mercheta," called in Fleta, p. 193, "merchetum "sanguinis," was a customary fine payable by a villein for licence to give away his daughter in marriage. It was a special mark of tenure in villenage. It is styled in Britton, l. i. ch. xxxii. § 3, "redempcioun de "saunc."

& quorum non est similis conditio, quia in psona uni^{9} erit liberum tenemētum, & in psona alteri^{9} villenagiū.

4. Si servus donationem facere possit, an non.

f. 26 b. Britton, l. ii. ch. iii. § 5. Fleta, 178.

Item videndum est an serv^{9} dare possit, et sciendum, q̄ de jure dare non potest tenementum, q̄ in villenagium tenuerit, vel in villano socagio; quòd si de facto fecerit, incontinenti revocari poterit res data sine brevi, & non sine brevi ex post facto. Si autem villan^{9}, sub potestate constitutus, vel extra, tenementum acquisitum, antequam dominus manum apposuerit, ad alium transtulerit, benè tenet donatio, nec revocari poterit, cùm dominus per negligentiam suam actionem suam amiserit. Si autem villanus sockmannus villanum socagium ad alium transferre voluerit, priùs illud restituat domino, vel servienti, si dominus præsens non fuerit, et de manibus ipsorum fiat translatio ad alium, tenendum liberè vel in socagio, secundùm quod domino placuerit, quia ille villanus sockmannus, non habet potestatem transferendi, cùm liberum tenementum non habeat, sed dominus. Et per hoc videri poterit manifestè, quòd si talis sockmannus ejectus fuerit, quòd ei non competit assisa, sed domino.

Cap. IX.

1. Si fiat donatio alicui ad terminum vitæ donatoris vel donatorii, et de donatione facta ad terminum vitæ vel annorum.

Fieri etiam poterit donatio ad terminum, vel ad tempus; ad terminum vitæ vel annorum, vitæ tam donatoris quàm donatorii, vel alterius ipsorum tantùm. Item ad tempus, i. quousque, vel donec provisum fuerit donatorio, & tunc refert, utrum mentio fiat tantùm de donatore, sine hæredibus, vel de donatore & hæredibus suis; & sive sic vel sic, refert utrum provideri debeat tantùm donatorio, vel donatorio & hæredibus suis. Quo casu, si hæredes non comprehendantur, nec

although after the likeness of villein sockmen and of those whose condition is not similar, because in the person of one there is a free tenement, and in the person of the other a villenage.

4. If a serf can make a donation, or not. f. 26 b.

Likewise we must consider whether a serf can give, and it is to be known, that he cannot of right give a tenement which he has held by villenage or in villein sockage, which if he should in fact do, the thing given may be forthwith revoked without a writ; but not without a writ, if delay occurs. But if a villein, who is within the power [of a lord], or is beyond it, shall have transferred to another an acquired tenement, before the lord has laid his hand upon it, the donation holds good, nor can it be revoked, since the lord through his negligence has lost his action. But if a villein sockman has wished to transfer his villein sockage to another, let him first restore it to the lord or his servant, if the lord should not be present, and from their hands let the transfer be made to another, to be held freely or in sockage, according as the lord pleases, because that villein sockman has not the power of transfer, since he has not a free tenement, but the lord [has it]. And by this it may be seen, that if such a sockman is ejected, he is not entitled to an assise, but his lord [is].

Chapter IX.

1. If a donation is made to any one for the term of life of the donor or of the donatory, and concerning donation made for a term of life, or of years.

But a donation may be made for a term, or for a time: for a term of life or of years; of life, as well of the donor as of the donatory, or of one or other of them only. Likewise for a time, that is, as long as or until provision is made for the donatory, and then it is of importance whether mention is made of the donor alone without heirs, or of the donor and his heirs; and whether in one way or in the other way, it is of importance whether provision is to be made for the donatory only, or for the donatory and his heirs. In which case, if the heirs are

Britton, l. ii. ch. ii. § 9. Fleta, 178. provisum sit à donatore in vita donatoris vel donatorii, remanebit res data in feodo cum ipso donatorio. Si autem provisum sit in vita ipsorum, revertatur terra data ad ipsum donatorem, per modum donationis. Si autem comprehendantur tantùm hæredes donatoris et non donatorii, et donator nec hæredes ejus providerint donatorio dum vixit, remanebit res data donatorio et hæredibus suis in feodo, quamvis hæredes donatoris, vel donator post mortem donatorii, parati sunt hæredibus ipsius providere. Si autem, vice versa, tantùm contineantur hæredes donatorii, et non donatoris, si donator providerit donatorio, vel ejus hæredibus, revertitur terra sic data ad donatorem, & si donator in vita sua non providerit, non sufficit, si post mortem suam velint hæredes providere, cùm modus donationis se habeat in contrarium. Si autem in donatione ab initio nulla facta sit mentio de hæredibus, si in vita ipsorum donatoris & donatorii non sit provisum, terra sic data non revertitur ad donatorem, nec hæredes suos, sed cum hæredibus donatorii in feodo remanebit. Si autem donatio fiat alicui ad vitam donatorii & non donatoris, & non in feodo, tunc erit terra data liberum tenementum ipsius donatorii. Si autem è converso, tunc erit liberum tenementum donatoris, & non donatorii, quia in vita donatorii revocari potest, si præmoriatur donator, hoc est, quia si donator in vita donatorii moriatur, statim revertitur res donata ad hæredes donatoris, & sic non erit liberū tenementū donatorii, quia in vita sua revocatur. Si autē fiat donatio sic, ad vitam donatoris donatorio & hæredib⁹ suis, si donatorius præ-
f. 27. moriatur, hæredes ei succedent, tenendum ad vitam

not included, and provision is not made by the donor in the life of the donor or of the donatory, the thing given will remain in fee with the donatory himself. But if provision has been made during their lives, the land given should revert to the donor himself, through the mode of donation. But if the heirs alone of the donor, and not of the donatory, are included, and neither the donor nor his heirs have provided for the donatory, whilst he was alive, the things given will remain to the donatory and to his heirs in fee, although the heirs of the donor or the donor himself, after the death of the donatory, are prepared to provide for his heirs. But if on the reverse, the heirs alone of the donatory, and not those of the donor, are included, if the donor has provided for the donatory or his heirs, the land so given reverts to the donor ; and if the donor during his life has not provided, it is not sufficient, if his heirs after his death are willing to provide, since the mode of the donation is to the contrary. But if in the donation from the commencement no mention has been made of heirs, if during the lives of the donor and of the donatory no provision has been made, the land so given does not revert to the donor nor to his heirs, but will remain in fee with the heirs of the donatory. But if a donation be made to any one for the life of the donatory, and not of the donor, and not in fee, then the land given will be a free tenement of the donatory himself. But if conversely, then it will be a free tenement of the donor and not of the donatory, because it may be revoked in the life of the donatory, if the donor should predecease him ; that is, because, if the donor dies in the lifetime of the donatory, the thing given reverts at once to the heirs of the donor, and so it will not be a free tenement, because it is revoked in his lifetime. But if the donation should be made thus, to the donatory and his heirs for the lifetime of the donor, if the donatory predeceases, his heirs f. 27.
will succeed to him, to hold for the lifetime of the donor,

donatoris, & per assisam mortis antecessoris recuperabūt, qui obiit,[1] ut de feodo. Et si donator præmoriatur, tunc, ut priùs, erit liberum tenementum donatoris, & nō donatorii, prædicta ratione. Sed ꝑpter hoc, hæredes inde ordinare non poterit; ut de termino, sicut in primo casu, quia statim post mortem donatoris, revocabitur res donata. Si autem nulla facta sit mentio de hæredibus donatorii, tamen non statim revertitur res data ad donatorem, nisi donatorius intestatus decesserit, vel si cùm testamentum fecerit, nullam de tali tenemento, quasi ad terminum annorum sibi relicto, fecerit mentionem, q quidem, si moriens inde in testamento ordinaverit, sicut de catallis, benè valebit testamentum. Si autem donator sic donationem fecerit, ꝑ se & hæredibus suis tali, nulla facta mentione de hæredibus donatorii, vel quòd ad vitam suam, res sic data erit liberum tenementum quoad vixerit donatori[2], quia taliter dare perinde est, ac si daret ad vitam. Si autem fiat donatio ad terminum annorum, quāvis longissimum, qui excedat vitas hominū, tamen ex hoc non habebit donatorius liberum tenementum, cùm terminus annorum certus sit & determinatus, & terminus vitæ incertus, & quia licèt nihil certi[2] sit morte, nihil tamen incertius est hora mortis. Poterit etiam quis terram alicui concedere ad terminum annorum, & ille eandem infra terminū illum alteri dare, vel eidem in feodo, & sic mutare unam possessionem in aliam, si firmarium feoffaverit. Si autem alium, utraq; possessio durabit, quia sese compatiuntur terminus & feoffamentū de eadem terra, quia ibi sunt diversa jura, ad feoffatum verò ꝑtinet ꝑprietas feodi & liberū tenementum, firmarius verò nihil sibi vendicare poterit, nisi usum fructuum,

[1] "quia obiit seisitus," MS. Crewe; MS. Rawl. agrees with the text.

and they will recover because he died seysed, by an assise of the death of an ancestor, as in the case of a fee. And if the donor predeceases, then, as before, it will be a free tenement of the donor and not of the donatory, for the reason aforesaid. But on that account, he cannot therefore ordain heirs, as concerning a term, as in the first case, because immediately after the death of the donor the thing given will be revoked. But if no mention has been made of the heirs of the donatory, the thing given nevertheless does not revert forthwith to the donor, unless the donatory shall have died intestate, or if he has made a testament, and he has made no mention of such tenement left to him, as it were for a term of years, because indeed, if the dying person has ordered it in his testament, as in the case of chattels, his testament will be valid. But if the donor has made a donation in this manner, for himself and his heirs to such a person, no mention having been made of the heirs of the donatory, or that [it is] for his life, the thing so given will be a free tenement, as long as the donatory lives, for to give in this manner is the same as to give for life. But if the donation be for a term of years, although the longest possible, which exceeds the lives of men, nevertheless, the donatory will not have a free tenement, since there is a certain and determinate term of years, and an uncertain time of life, and although nothing is more certain than death, nothing is more uncertain than the hour of death. For a person may grant to another some land for a term of years, and may give the same during that term to another, or to the same person in fee, and so change one possession into another possession, if he has enfeoffed the termor. But if [he has enfeoffed] another, each possession will hold good, for a term and an enfeoffment of the same land are compatible, for they imply different rights; to the enfeoffee there belongs the property and freehold of the fee, but the termor can claim nothing for himself but the enjoyment of the fruits, that is, that he

s. quòd liberè uti possit & sine impedimento feoffati ꝑcipere usum fructuum. Item dare poterit quis alicui, terram ad voluntatem suam, & quamdiu ei placuerit, de termino in terminum, & de anno in annum, & in quo casu, ille qui accipit nullum habet liberū tenementum, cùm dominus ꝑprietatis rem sic concessam repetere possit, sicut à ꝑcario. Item esto, quòd A. primò dimiserit ad terminum annorum, & postea, durante termino, feoffaverit inde B. & in possessionem induxerit, salvo firmario termino suo, & cùm nihil sibi retinuerit idem A. nisi tantùm nudum dominium, de facto feoffat ipsum firmarium, si idem B. post terminum completum se ponat in seysinam ratione primi feoffamenti, & firmarium ejecerit, non competit firmario restitutio per assisam, quia ipse A. non potuit ei facere liberum tenementum, cùm non haberet nisi nudum dominium. Sed hoc recognito per assisam, tenebitur ipse A. secundo feoffato ad escambium, in ipso judicio, sine alio brevi, propter fraudem. Cùm verò ipse primò feoffatus semel se posuerit in seysinam, & per secundum feoffatum fuerit ejectus, ꝑ assisam recuperabit, & non valeat donatio ab eodem facta, quia nihil habuit in dominico, nisi nudum dominium, s. homagium & servitium; ut habetis de termino Sancti Hilarii anno regni regis Henrici[1] in comitatu Norff. de Cicilia de Stradesete, & priore hospitał Sancti J. de Jerusalem in Anglia. Nec si talis donator, vel hæres ejus, ratione talis donationis
27 b. vocaretur ad warrantum, warrantizare teneretur. Et ad idem facit de termino Sancti Michaelis anno regni regis H. decimo tertio decimo quarto incipiente xiiij. in principio.

[1] No date is found in the earliest MSS. Rawl. and Crewe, nor in MS. Gal.

may freely use it, and without impediment on the part of the feoffee have the enjoyment of the fruits. Likewise a person may give to another land at will, or for so long a time as it pleases him, from term to term, or from year to year, and in which case, he who takes it has no free tenement, since the lord of the property may reclaim the thing so granted as from a tenant at will. Likewise, let it be that A. has first leased for a term of years, and afterwards during the term has enfeoffed it to B., and has inducted him into possession, saving to the termor his term, and since the same A. has retained nothing for himself except only the bare lordship, he in fact enfeoffs the termor himself, if the same B., after the term is completed, puts himself into seysine by reason of the first enfeoffment, and ejects the termor, the termor is not entitled to restitution by an assise, for A. could not give him a free tenement, since he had nothing but the bare lordship. But after this has been recognised by an assise, A. himself will be bound to the second feoffee to an exchange, in the judgment itself, without a writ, on account of fraud. But when the first feoffee has put himself into seysine, and has been ejected by the second feoffee, he will recover by an assise, and the donation made by him will not be valid, because he had nothing in the domain except the bare lordship, that is homage and service, as you have in Hilary term in —— year of king Henry, in the county of Norfolk, concerning Cecilia de Stradesete and the prior of the Hospital of Saint John of Jerusalem in England. Nor if such a donor or his heir, by reason of such a donation, should be called to warrant, would he be bound to warrant, and f. 27 b.
the same was adjudged in St. Michael's term in the thirteenth and the beginning of the fourteenth year of king Henry at the commencement.

Cap. X.

1. De donatione facta in liberam eleemosynam. Britton, l. iii. ch. ii. § 9. Fleta, 205.

Poterit etiam fieri donatio in liberam eleemosynam, sicut ecclesiis cathedralibus, conventualibus, parochialib⁹, viris religiosis, & quandoq; in liberam eleemosynam & perpetuam, & quo casu, non excusatur ille, qui accipit, à præstatione servitii. Si autem fiat donatio in liberā, puram, & perpetuam eleemosynam, excusatur. Et de hac materia pleniùs infrà, de assisa. Ad istam[1] donationem sequentur casus speciales. Quia esto, quòd quis dederit terram alicui domui religiosæ, quæ fuit eschaeta sua & de feodo suo; sed quam nunquam priùs habuerit in dominico suo, tenendā in puram & perpetuam eleemosynam, & quietam ab omni seculari servitio & exactione, & ita liberè, sicut aliqua eleemosyna alicui domui religiosæ liberiùs & meliùs dari possit. Si ille, qui eam feoffavit, inde alicui alteri fecit cōsuetudines et servitia, & de quibus illi religiosi nunquam acquietantiam habuerint, si, cùm implacitati fuerint de servitio illo, feoffatorem suum vocaverint ad warrantū, warrantizare non debet, licèt verum sit, quòd quis possit liberiùs terram dare, quàm ipse tenuit, quia non debet, nisi quod suum fuit, warrantizare, s. terram quæ fuit eschaeta sua, remittens eis servitiū sibi debitum, alienum autem servitium per talē donationem tollere non potuit nec minuere, nisi hoc specialiter susciperet in se, de alterius domini voluntate, cùm warrantia & defensione, quod autem suum fuit, remisit, ꝑ se & hæredibus suis, & quantū ad se & ipsos, liberam & puram fecit eleemosynam, quantū ad alios verò nequaquam. Item esto, quòd quis sic dicat, Do tali tantā terram ita liberè sicut illā tenui, die quo illi feci donationē, vel sicut unquam

[1] "Et istam," MSS. Rawl. and Crewe.

Chapter X.

A donation may also be made in free alms, as to churches cathedral, conventual, and parochial, to men under vows of religion, and sometimes in free and perpetual alms, and in which case he, who accepts, is not excused from the performance of service. But if the donation is made in free, absolute, and perpetual alms, he is excused. And on this subject more [will be said] hereafter [in treating] of the assise, and special cases will follow that donation. For let it be, that some one has given land to a religious house, which was his escheat, and of his fee, but which he never had before in his domain, to be held in absolute and perpetual alms, quiet from all secular service and exaction, and as freely as any alms can be given to any religious house, more freely and better [than ordinary]. If he, who has enfeoffed it thereupon to one person, has performed customs and services to another, and concerning which those religious persons never had an acquittance, if, when they should be impleaded concerning that service, they should call their feoffor to warrant, he ought not to warrant, although it may be true that a person may convey land more freely than he has held it, because he ought not to warrant, except what was his own, namely, the land which had been his escheat, releasing to them the services due to himself; but he could not take away or diminish by such a donation a service due to another, unless he specially took this upon himself with the consent of the other lord, with a warranty and a defence, that what was his own he has remitted for himself and his heirs, and as far as regards himself and them, he has made it a free and pure alms, but as regards others by no means so. Likewise let it be, that a person says thus, I give such a person so much land, as freely as I held it on the day on which I made him that donation,

1. Of a donation made in free alms.

liberiùs tenui, vel sicut ego vel aliquis antecessorū meorum illā liberius unquam tenuim⁹, quo casu, videndum erit si terra illa libera sit erga alios, vel onerata, & de quib⁹ servitiis, & quib⁹, & à quo tempore, ut sic teneatur donator ille qui dedit, vel non teneatur.

2. Quod quis possit dare terram liberius, quam tenuit. Britton, l. ii. ch. iii. § 8.

Item, q̄ quis liberiùs dare possit terram in liberam, puram, & perpetuam eleemosynā, quàm ipse tenuerit de feoffatorib⁹ & capitalib⁹ dominis suis. Et quòd hæredes tenentur warrantizare, si chartam cognoverint, vel p̄bata fuerit, habetis de itinere M. de Pateshul, de loquela[1] diversorum comitatuū, quæ fuerūt sup̄ judicium in itinere suo anno regni H. tertio de magistro militiæ Templi in Anglia. Item si quis dederit alicui domui religiosæ terrā cum corpore suo, in extrema voluntate, & inde moriatur seysitus, nō valet donatio, nisi interveniat hæredis confirmatio, quæ omnē supplet defectum. Et unde, si hæres post confirmationem petat p̄ assisam, obstabit ei exceptio cōfirmationis, licèt prima facie videatur, q̄ cōfirmatio nulla, ubi donum præcedens invalidum judicetur. Si autē p̄ tres dies vel quatuor ante mortē suam, vel antequā religioni se transtulerit, dederit, & seysinam domui religiosæ fecerit, non succurritur hæredi p̄ assisam mortis antecessoris ad seysinā
f. 28. recuperandā, quia seysitus non obiit, & statim efficitur liberum tenementum, cùm simul cōcurrunt jus & seysina, ut de ultimo itinere M. de Pateshul, in comitatu Eborum. Item pluribus fieri poterit donatio simul & in eodem tempore, sicut in diversis temporibus & successivè.

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[1] "loquela." This word is contracted in the MSS., and "loquelis" is probably the correct extension, corresponding to "quæ fuerunt."

or as I have ever held it more freely, or as I or any one of my ancestors have ever held it more freely, in which case it will have to be seen if that land is free as regards others, or is burdened, and with what services, and to whom and from what time, that the donor who has given it may be so bound or not so bound.

2. That a person may give land more freely, than he has held it.

Likewise, that a person may give land for free, absolute, and perpetual alms more freely than he has held it of his feoffors and chief lords, and that the heirs are bound to warrant, if they have cognisance of a deed, or it has been proved, you have in the Iter of Martin de Pateshul, from the imparlances of divers counties, which took place upon the judgment in his Iter in the third year of king Henry's reign, concerning the master of the military order of the Temple in England. Likewise if any one has given land with his person to some religious house, in his last wishes, and thereupon dies seysed, the donation is not valid, unless the confirmation of the heir, which supplies all defects, intervenes. And hence if the heir, after [such] confirmation, claims it by an assise, the objection of his confirmation will be in his way, although at first sight it would appear that the confirmation is null, where the preceding donation is judged invalid. But if he has given it three or four days before his death, or before he transferred himself to religion, and has made seysine to the religious house, there is no help given to the heir to recover seysine by an assise of the death of an ancestor, because he did not die seysed, and it is forthwith made a free tenement, since both the right and the seysine are concurrent, as in the last Iter of Martin de Pateshul, in the county of York. Likewise a donation may be made to several together and at the same time, as at different times and successively. f. 28.

Cap. XI.

1. De donationibus factis pluribus simul, sive successive. Dig. XLI. i. § 11.

Pluribus & legittimis poterit fierit donatio successivè, ut suprà dictū est, vel simul omnib⁹ ab initio, & quorum omnes possunt esse plenæ ætatis, vel infra ætatem, vel quidā eorum. Et si omnes infra ætatem sint, oportet q donator omnib⁹ det tutorē, quia ipse donator tutor esse non poterit, ne seysinam suā continuare videatur, nec poterit minor donationi consentire, nisi hoc faciat tutore authore. Si autem omnes plenæ ætatis extiterint, non erit necessaria tutoris authoritas, quia quilibet eorū sufficit sibi ipsi. Si autē quidam infra ætatē, & quidā non, si donator voluerit, possunt majores esse tutores minorum, dum tamen nulla suspitio habeatur, q machinari velint in mortem minorum, tollitur autē suspitio, ut si fiat donatio patri vel matri, et eorum pueris legittimis. Aliud tamē esset, si fratri, vel avunculo, vel nepoti, ꝑpt̄ jus accrescendi. Sed cùm aliquis eorum sine hærede decesserit, cùm sint ita feoffati simul & nō separatim, quæritur, si pars decedentis accrescere debeat superstitibus, vel ad donatorem reverti ꝑ defectu hæredum? & verum est quòd non ad donatores, nec ad superstites, ꝑ jus accrescendi, sed ex jure successionis, quia poterit quilibet esse hæres alteri⁹, cùm sint legittimi, quod esse non potest de bastardis, sicut inferiùs dicetur. Nec ratione alicu⁹ partis decedentis cōpetit domino capitali seysina, quia si se poneret in seysinam, sic superstitibus faceret disseysinam, cùm nullā partem sciat, ut possit distinguere ab alia, & quam partem debeat habere custos. Sed quid, si un⁹ moriatur, relicto hærede infra ætatem existente, quæritur, in cuj⁹ cus-

Chapter XI.

1. Of donations made to several persons together, or successively.

A donation may be made to several legitimate persons successively, as above said, or simultaneously to all from the commencement, and of whom all may be of full age, or under age, or some of them. And if all are under age, it is requisite that the donor name a guardian to them all, for the donor himself cannot be a guardian, lest he should seem to continue his seysine, nor can a minor consent to a donation, unless he does so by the authority of a guardian. But if they should all be of full age, the authority of a guardian would not be necessary, because each person is sufficient for himself. But if some are under age and some not, if the donor wishes, those of majority may be guardians of those, who are minors, provided, however, no suspicion is entertained that they wish to plot the death of the minors, but the suspicion is removed, as [for instance] if the donation is made to the father or the mother, and to their legitimate sons. It would be, however, a different thing if it were to a brother or an uncle or a nephew, on account of the right of accretion. But when any of them dies without an heir, since they are all enfeoffed together, and not separately, it is asked whether the share of the deceased one ought to accrue to the survivors, or to revert to the donor from failure of heirs? and it is true, that it does not [revert] to the donors nor to the survivors by right of accretion, but by right of succession, for any one may be the heir of another, when they are legitimate, which cannot be in the case of bastards, as will be explained hereafter. Nor is the chief lord entitled to seysine with regard to any share of the deceased, for if he were to put himself into seysine, he would thereby make disseysine [available] to the survivors, since he knows no [special] part, so as to be able to distinguish it from another, and which he is entitled to have separately as guardian. But what if one should die, leaving an heir under age? it is asked, in

todia remanebit, & quàm partem habere debeat custos in custodia ? cùm nulla sit pars certa vel determinata. Oportet igitur de necessitate, q̃ fiat partitio rei datæ, ut dominus capitalis certam partem habeat in custodia.

2. Si pluribus bastardis simul de concubina.

Item fieri poterit donatio plurib⁹ bastardis, de cõcubina natis, sicut legittimis, ut si fiat donatio pueris alicujus bastardi, duobus vel pluribus, & quo casu dari possunt curatores (ut suprà), si fuerint infra ætatem ; & si unus illorum obierit sine hærede de se, quæritur utrum reverti debeat pars decedentis ad ipsum donatorem pro defectu hæredis ? cùm deficiant hæredes de corpore decedentis, & non poterit eorũ aliquis alteri succedere de jure successionis, cùm quilibet eorum alteri sit extraneus, quoad successionẽ ; videtur, quòd ad donatorem reverti debeat, facta partitione, nisi sit qui dicat, quòd pars decedentis accrescere debet superstitibus, p̃ jus accrescendi ; cùm non possit de jure successionis. Si autem facta fuerit donatio pluribus simul, tàm legittimis quàm bastardis & eorum hæredibus, et legittim⁹ moriatur, nulla facta partitione, relictis hæredib⁹, fiet partitio ut suprà, quia bastardi habere poterint hæredes de corpore suo ; si autem nullos reliquerit, tunc videtur, quòd locum habere debeat jus accrescẽdi, & eodem modo fiat de bastardo, sicut superiùs dictũ est, & sic videtur, q̃ quãdiu unus eorum vel aliquis eorũ hæredum superstes fuerit, q̃ nihil ad donatorẽ reverti debeat, nisi tunc demum, cùm omnes defecerint. Item fieri poterit donatio plurib⁹ pueris, tam nominatis quàm non nominatis, & tam natis quàm nascituris, & tam absentib⁹ quàm præsentibus, & ita q̃ si minores sint, & eis tutor detur, ubicunq̃ fuerint,

f. 28 b.

whose guardianship will he be, and what part ought the guardian to have in guardianship, since there is no part certain and determinate. It is incumbent, therefore, from necessity that there should be a partition of the thing given, so that the chief lord may have a certain part in guardianship.

2. Of donations given to several bastards out of a concubine.

Likewise a donation may be made to several bastards born of a concubine, like as to legitimate children, as if a donation be made to the boys of a bastard, two or more, and in which case curators may be appointed (as above) if they are under age; and if one of them shall have died without an heir of himself, it is asked whether the share of the deceased ought to return to the donor from failure of heirs, since there are no heirs of the body of the deceased, and none of them can succeed the other by right of succession, since each of them is a stranger to the other, as regards the succession, it seems that it ought to revert to the donor, after a partition has been made, unless there is some one who will say, that the share of the deceased ought to accrue to the survivors by right of accretion, since it cannot by right of succession. But if a donation has been made to several persons together, as well legitimate offspring as bastards, and to their heirs, and a legitimate offspring dies, no partition having been made, leaving heirs, a partition shall be made as above, because bastards may have heirs of their own bodies; but if they have left no heirs, then f. 28 b. it seems that the right of accretion should operate, and that the same result, as above said, should take effect in the case of a bastard, and so it seems that, as long as one of them or any of their heirs survives, nothing should return to the donor, until then at length, when all have failed. Likewise a donation may be made to several sons, named as well as not named, and born as well as to be born, and absent as well as present, and in such a manner, that if they be minors and a guardian be named for them wherever they may be, present or

præsentes vel absentes, nati vel nascituri, acquiritur eis p̄ tutorem, qui nomine eorum fuerit in possessione, quia ipse possidet, cujus nomine possidetur, & eis acquiritur absentibus p̄ curatorem, tanquā p̄ p̄curatorem, sicut domino, absenti & ignoranti, & etiam dormienti p̄ servum acquiritur, ut per procuratorem, si nomine domini stipuletur, & etiam sicut acquiritur verò hæredi absenti p̄ custodem, cùm nomine veri hæredis fuerit in possessione. Item fieri poterit donatio legittimæ concubinæ suæ, & pueris suis, præsentibus & absentibus, natis & nascituris, & si omnes infra ætatem extiterint, poterit mater esse in seysina nomine p̄prio, & nomine puerorum suorum, sicut tutrix & curatrix, & sic poterit ipsa habere liberum tenementum nomine p̄prio, & curationem nomine liberorum, in eodem tenemento, & sic acquirere poterit sibi ipsi liberum tenementum cùm fuerit in possessione ex causa donationis, nomine p̄prio, & pueris suis omnib⁹ tam minoribus quàm majoribus, ut prædictum est, & ex sua procuratione. Et unde, si, cum in possessione fuerint, ejiciantur quidā vel omnes, competit eis assisa novæ disseysinæ ad seysinam suam recuperandam, & cùm absentes fuerint & non admittantur, eodem modo competit eis assisa, quamvis p̄ se ipsos p̄sonaliter priùs in seysina non extiterint, quia sufficit, si alius nomine eorum, sicut p̄curator, vel curator, quia p̄ p̄curatorem acquiritur possessio absenti, & retinetur sicut corpore p̄prio, & similiter animo p̄curatoris, sicut animo p̄prio, cùm acquiri possit ignoranti, sicut scienti, & absenti sicut præsenti. Item fieri pote-

Dig. XLI. ii. § 5.
Dig. XLV. i. § 62.
Dig. XLI. ii. § 20.

absent, born or to be born, acquisitions may be made for them by a guardian, who in their name shall be in possession, because he, in whose name a thing is possessed, possesses it, and a thing is acquired for those, who are absent, by a curator, as it were by a procurator, like as [a thing] is acquired for a lord, who is absent, and ignorant, and even sleeping, by a servant, as by a procurator, if he stipulates in the name of the lord, and also as a thing is acquired to a true heir who is absent by a guardian, when he has come into possession in the name of the true heir. Likewise a donation may be made to a legitimate concubine and to her sons, present and absent, born and to be born; and if they should be under age, the mother may be in seysine in her own name and in the name of her sons, as guardian of their persons and manager of their property, and so she may have a free tenement in her own name, and the management of the same tenement in the name of her children, and so she may acquire for herself a free tenement, when she has come into possession in consequence of the donation in her own name, and for all her sons minors, as well as those of age, as has been said before, and from her own procuration. And thence, if, when they have been in possession, they should be ejected, some of them or all, they are entitled to an assise of novel disseysine to recover their seysine, and when they shall be absent and are not admitted, they are in the same manner entitled to an assise, although they may not have been before by themselves personally in seysine, because it is sufficient if another [has been in seysine] in their name, as procurator or curator, because possession may be acquired by a procurator for an absent person, and is retained as it were by the actual person, and in like manner through the will of a procurator, as it were by the will of the actual person, since it can be acquired for an ignorant person equally as for a person aware of it, and for an absent person equally as for a person present. Likewise

Dig. XLI. i. § 13. rit donatio plurib⁹ ꝑsonis simul, extraneis, sicut ex parentela conjunctis, ut suprà, ut si A. donationem fecerit B. & C. simul, qui sese non contingūt & eorum hæredibus, qui si hæredes habuerint, cuilibet eorum loc⁹ erit partitioni. Si autē alicui ipsorum tantùm, ipsi⁹ hæredes succedunt in solidū, ꝓpt̃ unionem donationis, & jus accrescēdi. Et si nullos hæredes habuerint, revertetur terra data ad donatorē. Itē si plurib⁹ fiat donatio, sicut viro & uxori simul, & nō ꝑ se, & eorū hæredibus, & nō ut maritagiū, sed ut purum feoffamētum; tunc refert utrū certis & coarctatis hæredibus, vel utrū universalitèr omnib⁹. Si autē coarctatis & certis hæredibus, & illis deficiētib⁹, revertitur res donata ad donatorē, quāvis alii extiterint. Si autē universalitèr omnib⁹, tunc si cōmunes eorū hæredes extiterint, tales aliis præferuntur, si autē defecerint, tunc separati (ut videtur) admittantur. Si autē fiat mētio, q̃ terra data sit in maritagiū cum uxore & eorū hæredibus, cōmunes hæredes de corpore utriusque admittātur, qui si defecerint, revertitur t̃ra data, & alii remotiores excludūtur; quia res data, est liberū tenemētū uxoris, & nō viri, cū nō habeat, nisi custodiā, cū uxore. Si autē sic detur t̃ra in maritagiū, viro cū uxore, et eorū hæ-

f. 29. redib⁹, ꝑ homagio et servitio viri (q̃ fit aliquando), licèt detur in libeř maritagium, q̃ sunt sibi adinvicē adversantia sive repugnantia, tūc p̃fertur homagiū, & erit, ac si fieret donatio, tam viro quā uxori. Item si uxor rem viri dederit sine assensu viri, viro cōpetit restitutio, vel per assisam novæ disseysinæ, vel ꝑ breve de ingressu, sicut cuilibet alii de populo, sc. de eo, q̃ sine

a donation can be made to several persons together, to strangers equally as to persons connected by relationship, as above, as if A. has made a donation to B. and C. together, who have no relationship, and to their heirs, if such persons shall have heirs, each of them will be entitled to a partition. But if [it be made] to either of them alone, his heirs will succeed to the entirety; on account of the union of the donation and the right of accretion. And if they shall have no heirs, the land given will revert to the donor. Likewise, if a donation be made to several, as to a husband and wife together, and not by themselves, and to their heirs, and not as a maritage, but as a pure enfeoffment, then it is of importance whether [it be given] to certain and limited heirs or universally to all. But if to limited and certain heirs, upon their failure the thing given will revert to the donor, although there may be other heirs. But if universally to heirs general, then if there be common heirs to them, they are preferred to others, but if they fail, then heirs separate are admitted, as it seems. But if mention is made, that the land is given as a maritage with a wife and for their heirs, the common heirs of the bodies of each shall be admitted, and if such fail, the land given reverts, and others more remote are excluded, because the thing given is a free tenement of the wife's and not of the husband's, since he has only the custody of it with his wife. But if the land be so given as a maritage, to the husband with the wife and to their heirs, for the homage and service of the man (which is sometimes done), although it is given as a free f. 29.
maritage, since they are adverse and repugnant to one another, then the homage is preferred, and it will be as if the donation were made to the husband, as well as to the wife. Likewise, if the wife has given the property of her husband without the assent of her husband, the husband is entitled to restitution, either by an assise of novel disseysine or by a writ of entrance, just as any other of the people, for instance, on the ground that she

voluntate sua alienavit. Si autē è contrario, vir rem uxoris suæ dederit, nunquā revocabitur in vita ipsi? viri, eò quòd viro suo uxor contradicere non potest. Si autē vir rem tam sibi, quam uxori datam dederit, uxor donationem viri in vita viri revocare nō potest, sed si uxor donationem fecerit, vir illam revocare poterit.

Cap. XII.

1. Si vir uxori donationem facere possit constante matrimonio. Britton, l. ii. ch. iii. § 6 & 11. Fleta, 178. Dig. XXIV. t. i. § 1.

Item quæritur an vir uxori donationē facere poterit, vel è cōtrario; constante matrimonio. Matrimoniū autem accipi possit, sive sit publicè cōtractum, vel fides data, q̄ separari non possunt, & revera donationes inter vir̄ & uxorē, constante matrimonio, valere non debent, & est causa, ne fiant p̄pter eorum libidinem, vel nimis eorum immoderatā egestatem. Et quòd hujusmodi donationes non valēt, p̄batur in rotulo de termino Sancti Mich. anno regni regis H. 15, com̄ Lincolniæ, de itinere, assisa mortis antecessoris, si Helewisa, cui quid Eudo donationē fecerat, postquā eam affidaverat, & cum qua publicè postea contraxit, & ubi hæredes Helewisæ nihil ceperunt p̄ assisam mortis antecessoris de seysina ipsius Helewisæ. Ad idem facit de termino Sanct. T. anno regni regis Hen. 17, de Petronilla, q̄ fuit uxor Wilhelmi de San. Martino, com̄ Norf., q̄, cum post mortem viri sui ejecta esset de tenemento ei sic dato, recuperare non potuit seysinam per assisam novæ disseysinæ, quia donum & feoffamentum illud ipso jure nullum. Item ad hoc facit de termino Sancti H. anno reg.[1] Hen. viii°. com̄ Not., de Roberto de Wallingh. & Johanna uxore

[1] "regni regis," MS. Rawl. The decision in this case presumes a change in the law since Glanville's time, as no such prohibition is mentioned by him.

has alienated [the property] without his assent. But if, on the contrary, the man has given away the property of his wife, it shall never be revoked during the life of the man, because a wife cannot contradict her husband. But if a husband has given away a thing given to himself as well as to his wife, the wife cannot revoke the donation of the husband during his life; but if the wife has made a donation of it, the husband may revoke it.

Chapter XII.

1. If a husband can make a donation to the wife, whilst the marriage lasts.

Likewise it is asked whether a man can make a donation to his wife, or the converse, whilst the marriage lasts. But a marriage is to be taken to exist, whether it be publicly contracted, or the parties are betrothed so that they cannot be separated, and in truth, donations between husbands and wives, whilst marriage lasts, ought not to be valid, and there is a reason why they should not be made, on account of their lust, or their immoderate want. And that such donations are not valid is proved from the Roll of Michaelmas term, in the fifteenth year of the reign of king Henry, in the county of Lincoln, on the Iter, in an assise of the death of an ancestor, if Elouise to whom a certain Eudo had made a donation, after he was betrothed to her, and with whom he afterwards contracted publicly, and when the heirs of Elouise took nothing by an assise of the death of an ancestor upon the seysine of Elouise herself. The same point was made in Trinity term, in the seventeenth year of the reign of king Henry, in the case of Petronilla, who was the wife of Wilhelm of Saint Martin's, in the county of Norfolk, that when, after the death of her husband, she had been ejected from a tenement so given to her, she could not recover seysine by an assise of novel disseysine, because that donation and enfeoffment were null in law. The same point was established in Hilary term, in the eighth year of king Henry, in the county of Nottingham, concerning Robert of Wallingham

ejus, ubi dicitur, quòd non valet talis donatio, maximè, quia uxor, cui donatum fuit, nunquam seysinam habuit ante desponsationem, & ex quo vir suus obiit inde seysitus; & quia terra illa nunquā separata fuit ab aliis terris ipsius viri sui. Sed quid, si post divortium factum fiat talis donatio? benè valet, & tenet. Item esto, q cū talis donatio directè fieri non poterit à viro vxori, vel è contra, constante matrimonio, si fiat indirectè, ita q vir dederit extraneo, ut extraneus statim vel post mortem suam rem datam det uxori, vel è contrario, si uxor donationem velit facere viro, videtur q valere non debet, quia sic fit fraus constitutioni,[1] & perinde est ac si directè fieret donatio, nec refert, utrum quid fiat, vel per simile, vel per id quod tantundem valet. Contrarium tamen factum fuit, & malè de errore curiæ, & quasi de consilio curiæ, de Godfrido de Crewcombe, qui dedit terrā Roberto de Muscegros, ut idem Robertus illā daret post mortē ipsius Godfridi, uxori ipsius Godfridi. Item esto, quòd fiant donationes ante sponsalia, & ante matrimonium, videndum an valere debeant, & q prima facie valere debent, videtur, quia donationes in concubinatu collatas non posse revocari constat, nec si matrimonium fuerit posteà inter eos contractū, ad irritum recedere non poterit, q antea de jure valuit, sed hoc erit cum distinctione, quia refert utrum hoc fiat ob causam & affectionē matrimonii subsequentis, vel nō, quia post, si inter tales psonas contractū sit matrimoniū, manifestè videtur q maritalis honor & affectio pridem p̃cesserat psonis cōparatis, considerata vitæ cōjunctione. Sed esto, q post talem donationem ad alia

Dig. XXIV. t. i. 32, § 10.

f. 29 b.

Dig. XXIX. i. § 31.

Dig. XXIV. i. §§ 3, 1.

[1] "constitutioni," Fleta iii. 3. § 12, says, "quia hoc prohibetur in "lege." It is probable that "constitutio" here means the Statute of Merton, 20, H. iii. The same phrase occurs below, p. 252.

and Johanna his wife, where it is said that such a donation is not valid, chiefly because the wife, to whom the donation has been made, never had seysine before her espousals, and because her husband died seysed of it, and because that land was never separated from the other lands of her same husband. But what, if after a divorce has been granted, such a donation is made? It is valid and holds good. Let it be that, since such a donation cannot be made directly by a husband to his wife whilst the marriage lasts, if it be made indirectly, so that, what the husband has given to a stranger, the stranger may give the thing given either forthwith or after his death to the wife, or, on the contrary, if a wife wishes to make a donation to her husband, it seems that it ought not to be valid, because there will be a fraud against the Statute, and it is the same as if the donation were made directly, nor does it matter whether a thing be done, or something like it be done, or something which is equivalent. The contrary, however, was done, and ill done by an error of the Court, and as it were purposely by the Court in the case of Godfrey de Crewcombe, who gave land to Robert of Muscegros, that the said Robert should give it after the death of Godfrey to the wife of Godfrey. Likewise let it be, that donations are made before espousals and before matrimony, we must consider whether they ought to be valid, and it seems at first sight that they ought to be valid, for it is settled, that donations made in concubinage may not be revoked, nor, even if matrimony has afterwards been contracted between them, f. 29 b.
can that be invalidated, which was previously valid of right; but this will be with a distinction, for it is of importance, whether this is done from the motive and affection of the subsequent marriage or not, because afterwards, if a marriage be contracted between such persons, it manifestly seems that the marital honour and affection had long before preceded upon a comparison of the persons and on the consideration of a conjoined life.

vota cõvolaverint vir & uxor, & ad actus contrarios revocari non poterit talis donatio, si fuerit pura & sine oñi conditione. Si autem conditionalis, ut si ita contrahatur, Do ut facias; revocari poterit, quasi causa non sequuta. Simplices donationes faciendæ non sunt, nec ante nuptias nec ante matrimonium, nec in ipso matrimonio, sed propter nuptias, ut si fiat dotis constitutio, & ita tamen, quòd dotis quantitatem non excedant, scilicet tertiam partem, quæ dicitur dos rationabilis, ut C. de donationibus ante nuptias L. cum milite.[1] Si igitur, ubi dicitur, quòd si nomine & substantia nihil distat à dote donatio ante nuptias facta viro, quare non ea[2] simili modo & matrimonio contracto dabitur; scimus[3] itaque omnes licentiam habere, sive priusquam matrimonium contraxerint sive posteà, mulieribus donationes facere, propter dotis donationes, ita quòd vir constituere possit dotem ante matrimonium, & in matrimonio, & post, ut tamen non simplices donationes intelligantur, sed hoc[4] propter dotem, & propter nuptias factas: simplices etenim donationes non propter nuptias fiunt, sed propter nuptias vetitæ sunt & propter alias causas, propter libidinem fortè, vel unius partis egestatem, & non propter ipsarum nuptiarum affectionem efficiuntur, secundùm quod superiùs tactum est. Et si tales fieri possunt donationes ob amorem inter virum & uxorem habitum, posset alter eorum egestate & inopia consumi, quod non est sustinendum, & unde donatio inter

Glanville VI. 1.

Cod. V. iii. § 20.

Britton, l. ii. ch. iii. § 11. Fleta, 178.

[1] "L. cum milite." Selden ad Fletam, ch. 3, has pointed out this error in the printed text, which should be read "L. cum multæ," which is the reading of MSS. Rawl. and Gal. In MS. Crewe the reading is "cum milite;" in MS. Glas. "cum mlte."

[2] "non ea," MSS. Rawl. and Crewe; "non eadem," Gal.

[3] "scimus." Selden ad Fletam, ch. 3, has pointed out the error in the text, which should be "sanci-" "mus," according to the reading of MS. Glas. The word is contracted "s̃cimus" in MSS. Rawl. and Crewe, which has been overlooked by the editor of the printed text.

[4] "sed propter dotem et propter "nuptias factæ" MS. Rawl.

But let it be, that after such a donation the husband and the wife have betaken themselves to other vows and to contrary acts, such a donation cannot be revoked, if it be absolute and without any condition. But if it be conditional, as if it be contracted in this manner, I give that you may do, it may be revoked, as if the cause had not followed. Simple donations are not to be made, neither before nuptials nor before matrimony, nor upon [occasion of] matrimony, but on account of nuptials, as if there be a settlement of dower, and so however that they do not exceed the amount of dower, that is the third part, which is called reasonable dower, as in the Code De Donationibus ante Nuptias, L. Cum milite.[1] If, therefore, it be there said, that if a donation made by a husband before marriage differs not in name nor in substance from a dowry, wherefore shall it not be given in like manner after matrimony has been contracted? We ordain[2] then that all have liberty, whether before they have contracted matrimony or afterwards, to make donations to women on account of donations of dower, so that a man may settle a dowry before matrimony and in matrimony, and after matrimony, so that however simple donations be not understood, but effectively [donations] on account of dower and on account of nuptials celebrated, for simple donations are not made on account of nuptials, but on account of nuptials they are forbidden, and they are made on account of other causes, by reason of lust, perhaps, or of the indigence of one party, and not on account of the desire for marriage, according as has been said above. And if such donations could be made for love between a husband and wife, one of them might be consumed with want and indigence, which is not to be endured, and hence a donation

[1] The Constitution of the emperor Justinian, which seems to be here referred to, commences, "Cum multæ nobis interpellationes factæ sunt adversus maritos," &c.

[2] The quotation is nearly in the words of the Code.

Dig. XXIV. t. i. § 32. virum & uxorem ab initio invalida est, & nullo tempore valitura, nisi post mortem eorum interveniat confirmatio hæredum, qui possent hujusmodi donationem infirmare. Confirmatio vero talium validam facit donationem, quæ priùs fuit invalida, & omnem supplet defectum.

Cap. XIII.

1. Si felo post feloniam donationem fecerit, vel dimiserit ad terminum. Britton, l. ii. ch. iii. § 5. Fleta, 178. Item inter alia videndum est, an ille, qui feloniam fecerit, donationem facere possit, & feoffare, vel ad terminum dimittere, ad hoc quòd valeat donatio vel dimissio, & si ea, quæ ante feloniam fecerit, quando voluit & potuit, valere debeant, & tenere, sive terram dimiserit ad terminum, vel in feodum, & etiam ea, quæ post feloniam factam fecerit, aliquo vel omni tempore valere debeant & tenere. Ad quod videndum est, utrum donatio facta fuerit ad terminum, vel in feodo, & perfecta quando voluit & potuit, & valet quidem, quod agitur, tam de termino quàm de feoffamento. Item nec pater felonis, si fortè filius primogenitus fecerit feloniam in vita patris, si pater videns, quòd hæreditas ad hæredes suos remotiores descendere non posset, sic fecerit donationem, non valebit; nisi hoc fuerit per modum
f. 30. donationis; ut si pater ita feoffatus fuerit per chartam sibi & hæredibus suis, vel cui dare vel assignare voluerit, quod quidem facere non potuit, si donatio tantùm facta fuerit sibi & hæredibus suis. De feoffamento verò planum est. Sed de termino possit dubitari, quia videtur prima facie, quòd terra sic data ad terminum ante feloniam, statim cùm fuerit condemnatio subsequuta, licèt terminus non sit completus, debeat esse

between husband and wife from the commencement is invalid and at no time can become valid, unless after their death the confirmation of heirs intervenes, who could invalidate a donation of this kind. But the confirmation of heirs renders a donation valid, which was before invalid, and supplies every defect.

Chapter XIII.

1. If a felon makes a donation after his felony, or leases for a term.

Likewise we must consider, whether a person who has committed a felony may make a donation and enfeoff or demise for a term, so that the donation or the demise may be valid, and if those things, which he has done before his felony, when he had the will and power, ought to be valid and hold good, whether he has demised land for a term or in fee, and also [whether] those things which he has done after he has committed felony, ought to be valid and to hold good for any or all time. For which object we must consider, whether the donation has been made for a term, or in fee, and [has been] completed when he had the will and the power, [in which case] what is done is valid, as well for a term as for an enfeoffment. Likewise [as respects] the father of a felon, if perchance his firstborn son has committed a felony in the life time of his father, if the father seeing that the inheritance cannot descend to his more distant heirs, has thereupon made a donation, it will not be valid, unless it be through the mode of the donation; as, if the father has been so enfeoffed by a deed for himself and his heirs, or to whomsoever he shall choose f. 30. to give or to assign it, which he could not do, if the donation had been made to himself and his heirs only. But it is plain as regards an enfeoffment. But as regards a term, it may be doubted, because it seems at first sight that land so given for a term before a felony, forthwith, when a felony has followed, although the term be not completed, ought to be an escheat to the chief lord, the

eschaeta domini capitalis, quasi deficiente warranto; ad similitudinem ejus, quod dicitur, quòd si aliquis dimiserit terram aliquam alicui usque ad terminum annorum, & ille, qui dimiserit, ante terminum completum moriatur, hærede relicto & infra ætatem existente; si capitalis dominus firmarium ejecerit, cùm confirmatio sua non intervenerit, remanebit terra in manu capitalis domini, cum blado & fructibus in terra illa inventis, usque ad hæredis ætatem, quamvis hæres terminum illum warrantizare teneatur. Et sic videtur, quòd multotiens ejici potest firmarius post feloniam factam & convictam, quasi deficiente warranto suo. Et sicut videri poterit de uxore felonis dotem suam petente, quia obstabit ei exceptio, quòd warrantum de dote sua non habuit; et in quo casu distinguendum erit, utrum terra vel tenementum dimissum fuerit ad terminum vel ad firmam, ante feloniam commissam, quando dominus rei voluit & potuit, vel post feloniam, quando voluit, & non [1] posset. Si autem ante feloniam, quando voluit & potuit, tunc tenet terminus, sicut & omnia alia, quæ rite facta sunt ante feloniam, tempore congruo & licito. Et cùm feoffamentum tali tempore factum valeat & teneat, multo fortiùs valere debet terminus, & tenere, quia si potest quis id quod majus est, multo fortiùs & id quod minus est; & unde si capitalis dominus se posuerit in seysinam, & firmarium ejecerit, perquirat sibi firmarius per breve commune, sicut quilibet de populo, nec obstat quod dicitur de seysina custodis, quia in uno casu se in seysinam ponit, non ut dominus rei, sed ut custos, & custodia non adimit terminum, sed differt, nec terminus custodiam adimit nec differt. In alio vero casu non ingreditur seysinam ut custos, sed

[1] "cum non," MS. Rawl.

warrantor as it were failing; after the likeness of what is said, that if any one has demised any land to any one for a term of years, and he, who has demised, dies before the term is completed, leaving an heir who is a minor, if the chief lord has ejected the lessee, when his own confirmation has not intervened, the land will remain in the hand of the chief lord, with the corn and the crops found on the land, until the heir comes of age, although the heir is obliged to warrant the term. And so it seems that for many reasons a farmer may be ejected after a felony has been committed and conviction has followed, his own warrantor, as it were, failing. And as it may be seen concerning the wife of a felon claiming her dowry, because an objection will be in her way, that she has not a warrantor of her dowry. In which case a distinction must be made, whether the land or the tenement has been demised for a term or to farm before the felony has been committed, when the lord of the realty had both the will and the power, or after the felony when he had the will, but not the power. But if before the felony, when he had the will and the power, then the term holds, like all other things which have been duly done before the felony at a suitable and permissible time, and since an enfeoffment made at such a time is valid and binding, much more ought a term to be valid and binding; for if a person may do that which is greater, much more may he do that which is less; and hence, if the chief lord puts himself into seysine and ejects the termor, the termor may claim for himself by a common writ, like one of the people, nor is there any obstacle in what is said of the seysine of a guardian, because in the one case he puts himself into seysine, not as owner of the thing, but as having the custody of it, and the custody does not destroy the term, but prolongs it, nor does the term destroy nor prolong the custody. But in the other case he does not enter into seysine as guardian, but as the lord and in the place of the heir,

ut dominus, & loco hæredis, & cùm loco hæredis ingrediatur, omnia facere debet quæ pertinent ad hæredem, & quę ille facere deberet, cui ipse succedit, quamvis nomine eschaetæ, ac si felonią non commisisset, scil. warrantizare, acquietare & defendere debet. Nec succedit dominus capitalis ratione eschaetæ, nisi in universum jus, quod ille habuit, cui succedit, & unde cùm ille, qui dimisit, non posset firmarium de jure ejicere, si feloniam non commisisset, pari ratione nec ille, qui plus juris non habet, quàm ille, qui dimisit. Et si post feloniam commissam, dimiserit felo ad terminum, semper tenebit terminus imperpetuum, quousqe convincatur, nec obstat quod dicitur, de uxore felonis dotem petente, quòd obstat ei exceptio, quòd warrantum non habeat post feloniam convictam; quia quamvis dos ritè constituta fuit ante feloniam factam & convictam, tamen si petat post feloniam convictam, obstabit ei exceptio quòd warrantum non habeat, omnia enim quæ ante feloniam factam ritè acta sunt, semper valent & tenent, sive subsequuta fuerit condemnatio, sive non; ea vero quæ post feloniam facta sunt, semper valent & tenent, nisi fuerit condemnatio subsequuta, & si fuerit subsequuta, non valent, & omnia q̃ incepta fuerunt ante feloniam, vel post feloniam, post condemnationem nunquam pduci poterunt ad effectum, nec finem accipere, obstante exceptione feloniæ, & unde in hoc casu non est distinguendum, nisi inter ea, quæ perfecta sunt, & ea, quæ perficienda, & utrum condemnatio subsequuta fuerit, vel nō subsequuta. Et sic sufficienter dictum est de iis, quæ ad terminum dimittuntur. Si autem in feodo, sive ante feloniam vel post, omnia valent &

Britton, l. i. ch. vi. § 5. Fleta, 347.

30 b.

and when he enters in the place of the heir, he ought to do every thing which appertains to the heir, and which the person ought to do, to whom he succeeds, although in the name of an escheat, as if he had not committed felony, namely he ought to warrant, to secure, and to defend. Nor does the chief lord by right of escheat succeed to anything but the full right, which he had, to whom he succeeds, and hence, when he, who has demised, cannot of right eject the termor, if he has not committed felony, by parity of reason neither can he, who has no more right than the party who has demised.. And if after the commission of felony, the felon has demised for a term, the term will always hold in perpetuity, until he be convicted, nor is it an obstacle, what is said concerning the wife of a felon claiming dower, that the objection is in the way, that she has no warrantor after he has committed felony and has been convicted, because although her dowry has been duly settled before he committed felony and was convicted, yet if she claims it after he has been convicted of felony, the objection will be in the way, that she has no warrantor, for all things which were duly performed before the felony was committed are always valid and binding, whether condemnation has followed or not; but those things, which are done after the felony, are always valid and binding, unless there should be a subsequent condem- f. 30 b.
nation, and if there shall be a subsequent [condemnation] they are not valid, and every thing which has been commenced before the felony, or after the felony, can never be carried into effect after the condemnation, nor be fulfilled, the objection of felony being in the way, and hence in this case there is no distinction to be made, except between those things which are completed and those which are to be completed, and whether condemnation has followed or has not followed. And thus we have sufficiently discussed the things which are demised for a term. But if [they are] in fee, whether before a felony or after it, they are all valid and binding, until

tenent, quousque fuerit condēnatio subsequuta, & sic ea quæ ꝑfecta fuerint ante feloniam semꝑ tenent, & valēt, & ea, quæ facta sunt post feloniā, sēper remanent in suspenso, quousqꝫ condemnatio subsequuta fuerit, vel non subsequuta. Ea vero, quæ imꝑfecta sunt, quocūqꝫ tempore fuerint incepta, ante feloniā vel post, nunquam post condemnation ꝑduci possunt ad effectum. Sed esto, quòd justitiarii terram datam in feodo, vel ad terminū dimissam, ante feloniam factam, cùm felo convictus fuerit aliquo genere convictionis de facto (licèt non de jure), ceperint in manum domini regis, & ita q̄ habuerit annum & diem, nunquā poterit dñs capitalis talem seysinā recuperare, qualem rex habuit, non de jure, quia terrā datam in feodo non poterit felo forisfacere, nec etiā datam ad terminū, ante terminū cōpletum alicui tenendam in dominico, ꝑpter servitutem, quam firmarius sibi acquisivit ante feloniam ꝑpetratam, de usu fructuū habendo ad terminum vitæ vel annorū. Sed revera, quia post terminum reversura est ad capitalē dominū, tanquam eschaeta sua, habebit rex terminū suum, dū tamen in fine termini satisfaciat firmario ad valentiā, ita q̄ nihil firmario depereat. Et si fortè capitalis domin^{9} authoritate sua ꝑpria se ponat in seysinā, post annum & diem, firmarius habebit regressum vers^{9} eum ꝑ cōmune breve, scil. quare se intrusit in terram illam infra terminum suum. Si autē felo dimiserit ad voluntatem suam terram, & de anno in annū, ante feloniā ꝑpetratam vel post, statim post condōnationem, terra illa erit eschaeta capitalis domini, dum tamē dominus rex habeat terminum suum. Et q̄ nunquam ante condemnationem, vel donec felonia convincatur, possit terra felonis esse eschaeta capitalis domini, con-

Britton, l. i. ch. vi. § 3.
Fleta, 43.

a condemnation has followed ; and so those things, which have been completed before the felony, always bind and are valid, and those things, which have been done after the felony, always remain in suspense, until condemnation has followed or has not followed. But those things which are incomplete, at whatever time they were commenced, before the felony, or after it, cannot after condemnation be ever carried into effect. But let the case be, that the justiciaries have taken into the hand of the lord, the king, land given in fee, or demised for a term before the felony has been committed, when the felon has been convicted by some kind of conviction as a fact (although not of right), and so that the king has held it for a year and a day, the chief lord will never be able to recover such seysine, as the king has had ; not of right, because a felon cannot convey not even land granted for a term, before the term is completed, to any one to be held in demesne, on account of the servitude which the termor has acquired for himself before the perpetration of the felony, as regards the fruits to be enjoyed by him for the term of his life or for a term of years. But in truth as it is about to revert to the chief lord after the term, as his escheat, the king will have his term, provided that at the end of the term he satisfies the termor as regards the value, so that the termor loses nothing. And if by chance the chief lord of his own proper authority puts himself into seysine after a year and a day, the termor will have a re-entry against him by a common writ, namely, why he has intruded into that land within his term. But if the felon has demised his land at will, and from year to year, before the felony has been committed or afterwards, forthwith upon his condemnation that land will be an escheat of the chief lord, provided, however, the lord the king has his term. And because the land of a felon can never be an escheat of the chief lord before condemnation or before he be convicted of felony ; the custom of England

Dig. XXXIX. l. 5, § 15.

venit lex cum consuetudine Anglicana F. de donatione L. post contractum, ubi dicitur, quòd post contractum capitale crimen donationes factæ valent, nisi condemnatio subsequuta sit.[1]

Cap. XIV.

1. Si fiat donatio de re aliena.

Vidim[9] in p̃cedentib[9], q̃ donatio valeat cum effectu de re ꝑpria, & quæ revocari non poterit, cū donator illam statim fecerit accipientis: nūc autē videnđ, si donatio fiat de re aliena, et q̃ quidē nō valet cū effectu, quātū ad ipsū, cujus res fuerit, licèt valeat & statim fiat accipientis, quātum ad donatorē & donatoriū, & quantū ad illos, qui jus non habēt, nō tamen valet, quantū ad illum qui jus habet, statim, sed post temp[9]; quia si incontinēti ejiciat feoffatum, ꝑ assisam recuperabit. Sed si ꝑ negligentiam vel patientiā tēpus habuerit, sine brevi & judicio disseysiri nō poterit: poterit autem res esse omnino aliena & ex toto, quantum ad jus & proprietatem, & feođ, & liberum tenementum, usum fructuū & nudum usum, & aliquis posuerit se in seysinam, ꝑ disseysinam vel per intrusionem, cū fortè invenerit rem vacantem. Et si talis, dum ita fuerit in seysina, donationem fecerit, valebit quantum ad ipsum & feoffatum suum, & alios, qui jus non habent, ut prius dictum est, donec ꝑ illum, qui jus habet, revocetur. Item poterit esse aliena, quantū ad omnia p̃dicta, & alicujus in possessione existentis quoad nudum usum, vel quoad hoc, q̃ servitutem habeat in re, quoad usum fructuū ꝑcipiendi, sive ad certum terminum vel ad vo-

f. 31.

[1] The text of the Digest is: "Post contractum capitale crimen "donationes factæ *non* valent, [nisi] "condemnatio secuta est," cf. Selden ad Fletam, iii. 1; "secuta "sit," MS. Rawl.

agrees with the law in the Digest de donationibus, beginning with the words "post contractum," where it is said that donations made after a capital crime has been committed, are valid, unless condemnation has followed.

Chapter XIV.

We have seen in what precedes, that a donation of one's own property is valid with effect, and that it cannot be revoked, since the donor makes it forthwith the property of the acceptor. Now, however, we must see if a donation should be made of another person's property, that it is not valid with effect, as regards the person, whose property it is, although it may be valid and forthwith becomes the property of the acceptor as regards the donor and the donatory, and as regards those who have no right in it, it is not however valid as regards him, who has right in it, forthwith, but [only] after a time; because if he immediately ejects the feoffee, he will recover by an assise. But if through negligence or patience the acceptor has had time, he cannot be disseysed without a writ and a judgment. But the thing itself may be in every respect foreign and altogether so as regards the right, and the property, and the fee, and the free tenement, and the enjoyment of the fruits, and the bare use, and some one may have put himself into seysine through disseysine or through intrusion, when by chance he found the thing vacant. And if such a person, whilst he was so in seysine, has made a donation, it will be valid as far as regards himself and his feoffee, and others who have no right, as has been said above, until it be revoked by him, who has the right. Likewise it may be foreign as far as regards all the things above mentioned, and some one may be in possession of it as regards the bare use, or as regards this, that he has a servitude in it as regards the reaping of the fruits, whether for a certain

1. If a donation be made of another person's property.

f. 31.

luntatem. Item quoad hoc, q̃ habeat custodiam, vel curam, vel hujusmodi, in quibus casibus, si dum sic fuerit in seysina, quali quali, donationem fecerit, statim fit res data accipientis quoad dantem & accipientem, & quoad alios, qui jus non habent. Sed, quoad verum dominum, nunquam erit liberum tenementū, nisi ex longa & pacifica seysina, & unde, si incontinenti post tale feoffamentum posset verus dominus ponere se in seysinam, omnes quoscunq̃ tenere posset exclusos à possessione. Item poterit res esse propria p̃ minima parte, & aliena pro majori, ut si quis habeat liberum tenementum de re aliqua, & alius p̃prietatem & feodum, ut si mulier in possessione fuerit nomine dotis, vel alius, qui tenuerit ad vitam suam per donationem vel per legem Angliæ, vel donec ei provisum fuerit, vel hujusmodi, & tales donationem fecerint, statim faciunt accipientis liberum tenementum, & si ejiciantur, statim recuperabunt per assisam versus quoscunque, præterquam versus verum dominum, si ille statim ejiciat. Et cùm tales liberum habeant tenementum, statim & sine mora ex causa donationis ad alios transferunt id, quod habent. Sed si dominus p̃prietatis, antequā temp⁹ habeant & longā possessionem & pacificam, taliter feoffatos ejecerit, nunquā recuperabunt versus eū, quia seysinā non habent, nec tēpus, q̃ sufficere possit ad habend̄ libeř tenemenť. Nec ipsi donatores aliquo tempore habebunt regressum, ex quo animo & corpore & sine spe revertendi recesserunt à possessione. Si autē p̃ negligentiā vel patientiā domini p̃prietatis, per tantum tempus extiterint in seysina, quod sine brevi ejici non possunt, si à proprietario fuerint implacitati, vocare possunt ad warrantum feoffatores suos, & cùm eis fue-

time or at will. Likewise so far that he has the custody of it, or the care of it, or such like, in which cases, if whilst he is thus in seysine, of whatever kind the seysine may be, he makes a donation, the thing forthwith becomes the property of the acceptor as regards the giver and the acceptor, and as regards others, who have no right in it. But as regards the true lord it will never be a free tenement, except after long and peaceable seysine, and hence if immediately after such an enfeoffment the true lord can put himself into seysine, he may keep every person excluded from the possession. Likewise a thing may be one's own for the least part and another's for the greater part, as if one person has the free tenement of a thing, and another has the property and the fee, as for instance, if a woman shall be in possession in the name of dower, or another who holds it for his life by donation or by the Law of England, or until provision has been made for him, or such like, and such persons have made a donation, they forthwith make it the free tenement of the acceptor, and if they be ejected, they will forthwith recover by an assise against whomsoever, except against the true lord, if he should forthwith eject him. And when such persons have a free tenement, they forthwith and without delay in consequence of the donation transfer to others, what they themselves have. But if the lord of the property, before they have time and long and peaceable possession, should eject the persons so enfeoffed, they will never recover against him, because they have not seysine, nor time sufficient to constitute a free tenement. Nor will the donors themselves at any time have a re-entry, since they have withdrawn from the possession intentionally, and corporeally, and without the hope of returning. But if through the negligence or the patience of the lord of the property, they have been so long in seysine, that they cannot be ejected without a writ, if they be impleaded by the proprietor, they may call their feoffors to warrant them, and when they

rit warrantizatum, tenere possunt ad vitam feoffatoꝝ, & post mortem eoꝝ, habebit ꝑprietarius regressum versus eos, per breve de ingressu, si post feoffamentū tale non intervenerit confirmatio ꝑprietarii, vel hæredum ipsius, cùm jus ad ipsos pervenerit. Et hæc vera sunt, nisi sit, qui dicat, quòd tales, qui sic alienaverint ad exhæredationem veri hæredis, haberi debent pro mortuis, & ita hujusmodi donationes statim validæ sunt, quoad dantes & accipientes, & alios, qui jus non habent, & quoad proprietarium & ejus hæredes, in pẽdenti sunt & invalidæ, quousq; per eos infirmetur vel confirmetur. Item poterit quis habere jus merum, & ꝑprietatem feodi & liberum tenemenť, ex aliqua justa causa acquisitionis, & ex justo titulo, & alius hæc omnia, sed majus jus merum & ꝑprietatem & liberum tenementū, ex alia justa causa acquisitionis, propter temporis prioritatem. Sed quid dicitur de eo, qui nullam omnino seysinam habuit, nec aliquā juris scintillam, si donationem fecerit de re, quam alius tenet, ꝑ se ipsum vel ꝑ alium nomine suo, non faciet rem accipientis, cùm ipse nihil teneat, quia non potest plus juris ad alium transferre quā ipse habet, nec plus valebit ista donatio, quā valeret, si aliquis, transiens ꝑ aliquod manerium ab aliquo possessum, diceret socio suo viatori, Do tibi tale manerium, q̃ talis possidet, quia nihil aliud esset dicere, quā dare ei plenā pugnatam ex nihilo, cum possessio non sit vacua. Item esto q̃ servus, qui à domino possidetur, villenagium, q̃ à domino tenuerit, dederit alicui, & tunc observetur in omnibus secundùm q̃ superiùs dicitur, & secundùm q̃ donatorius longam habuerit seysinam vel brevem, & secunď quod dicitur inter placita

f. 31 b.

have been warranted, they may hold for the life of their feoffors, and after the death of them the proprietor shall have a re-entry against them, by a writ of entry, if after such an enfeoffment the confirmation of the proprietor has not intervened or of his heirs, when the right has devolved to them. And these things are true, unless there be some one, who says that such persons, who have so alienated a thing to the disinheritance of the true heir, ought to be regarded as dead, and so donations of this kind are forthwith valid, as far as regards the donors, and the acceptors, and others who have no right, and as regards the proprietor and his heirs they are pending and in operation, until they are invalidated or confirmed by them. Likewise a person may have the absolute right, and the property in the fee and the free tenement from some just cause of acquisition and with a just title, and another all these, but a more absolute right, and the property and the free tenement from another just cause of acquisition on account of priority of time. But what is said of him who has had no seysine at all, nor any spark of right, if he has made a donation of a thing, which another holds, either by himself or by another in his name, he will not make it the property of the acceptor, since he held nothing, for he cannot convey to another more than he himself possesses, nor will that donation be any more valid, than if any person passing through a manor possessed by another person should say to his companion traveller, I give you such and such manor, which so and so possesses, for it would be to say nothing else than to give him a complete handful of nothing, since the possession would not be vacant. Likewise let it be that a serf, who is in the possession of his master, gives to some one the villenage, which he holds from his lord, and then let there be observed in every thing according as has been said above, and according as the donatory has had a long or a short seysine, and according to what has been said amongst the pleas, f. 31 b.

quæ sequuntur regē, anno regni regis H. 21, Assisa novæ disseysinæ, si Simon filius Wydonis. Item esto quòd quis donationem fecerit alicui de terra, quæ pro parte est aliena, ut si ꝑprietarius donationem fecerit alicui de terra, quam mulier tenet ad vitam nomine dotis, vel alius ꝑ legem Angliæ, vel alio quocunq; modo ad vitam, talis donatio non valet, nisi ille qui ad vitam tenuerit, se dimittere voluerit & à possessione recedere. Aliter enim non poterit donator ꝑprietarius inducere donatorium in vacuam possessionē. Si autem se sic non dimiserit, non valebit donatio cum effectu ante mortem mulieris, sed quatenùs ad ipsum pertinet, inducere poterit donatorium in seysinam, & dare ei q ipse habet, scil. jus proprietatis & feodum, & atturnare ipsi donatorio servitium mulieris, & q sit ei intendens, sicut warranto suo de dote sua, & quo casu, si donatorius post mortem mulieris primam habuit seysinam, & donator vel ejꝰ hæredes petierint, defenditur donatorius vel ejus hæredes in possessione per exceptionem. Si autem donator vel ejus hæredes primam habuerint seysinam, dabitur donatorio vel ejus hæredibus actio ex conventione. Item esto, quòd proprietariꝰ donationem fecerit secundo viro uxoris, cujus ipse fuerit warrantus de terra, quam ipse vir & uxor simul tenent nomine dotis de dono primi viri sui, & si talis warrantus donationem facere voluerit, non potest donatorium inducere in seysinam vacuam, cùm sint idem corpus & eadem caro vir & uxor, nec poterit donator atturnare servitium uxoris viro suo, ratione prædicta. Et unde si post mortem uxoris ejectus fuerit, ex tali donatione seysinam non recuperabit.

which follow the king, in the twenty-first year of the reign of king Henry, in an assise of novel disseysine, if Simon the son of Wydon, &c. Likewise let it be, that some one has made a donation of land to another, which is partly foreign, as [for instance] if a proprietor has made to some one a donation of land, which a woman holds for her life under the name of dower, or some other person by the law of England, or in any other mode for life, such a donation is not valid, unless he who held it for life, is willing to demise it and to withdraw from the possession. For otherwise a proprietary donor cannot induct a donatory into a vacant possession. But if he has not demised it, the donation will not be valid with effect before the death of the woman, but as far as regards himself, he may induct the donatory into seysine and give him what he has, namely the right of property and the fee, and may attourn to the donatory himself the service of the woman, and that she shall look to him, as her warrantor as regard her dower, and in which case, if the donatory after the death of the woman has had the first seysine, and the donor and his heirs should claim it, the donatory or his heirs are defended in their possession by an exception. But if the donor or his heirs have had the first seysine, the donatory or his heirs will have an action on the covenant. Likewise let it be, that a proprietor has made a gift to the second husband of a wife, of which he himself has been the warrantor in regard to the land, which the husband himself and the wife hold together in the name of dower from the gift of her first husband, and if such a warrantor has wished to make a donation, he cannot induct the donatory into a vacant seysine, since husband and wife are one person and one flesh, nor can the donor attourn the service of the wife to her husband for the reason aforesaid. And hence, if after the death of the wife he has been ejected, he shall not recover seysine from such a donation.

Cap. XV.

1. Qualiter in donationibus mutatur una causa possidendi in aliam causam possidendi.

Mutatur quandoque per donationem una causa possidendi in aliam causam possidendi, ut si quis ab initio habuerit in aliqua re nudum usum, ex concessione proprietarii habere poterit usum fructuum. Item si ab initio habuerit usum fructuum & terminum, habere poterit existente termino, & dum sic fuerit in possessione, liberum tenementum, absque eo quòd se ponat extra seysinam, dum tamen interveniat solempnitas in ipsa mutatione, ne contingat donationem deficere pro defectu probationis. Item mutari poterit[1] una causa in aliam, ut si cui habenti liber tenementum concedatur, dum sic fuerit in seysina, quòd illud teneat in feodo, & inde habeat ꝑprietatē, sicut videri poterit de illis, qui tenent nomine dotis, vel ꝑ legem Angliæ, vel hujusmodi, poterūt enim de libero tenemẽto feodum facere possidenti; vel quòd id,[2] quod quis priùs ad terminum habuerit, dari ei possit in feodo, & quę solemnitas inde erit facienda, sive p̃sentes fuerint donator et donatorius, sive absentes, nō itaq; mutatur causa & possessio ipso jure, quia aliud est habere jus utendi & usum fructuum tantum, & aliud longè dominium & ꝑprietatem, & unde tutius est, quòd adhibeatur solēnitas ad ꝑbationē mutationis, quæ nisi fuerit adhibita, deficere poterit ꝑbatio, licèt jus non deficiat. Et poterit donator & verus dñs, cū voluntate tenentis, mutare unam causam possidendi in aliam, sine mutatione possessionis, nec est necesse resumere rem semel datam ad causam mutandam, cùm semel fuerit quis in possessione, ac si de novo fieri deberet donatio, quia si quis ꝑ intrusionem vel disseysinam semel habuerit ingressum, possit ei

f. 32.

[1] "Item mutari poterit" down to "possidenti" omitted in MS. Rawl., and inserted below, after "cum "damno ecclesiæ."

[2] "vel quod id" to "item esto, "quod quis donationem fecerit "viro" omitted in MSS. Crewe and Gal.

Chapter XV.

1. In what way in donations one cause of possession is changed into another.

One cause of possession is sometimes changed by a donation into another cause of possession, as if any one has had in anything from the commencement the bare use, he might have by a grant from the proprietor the use of the fruits. And if he had from the commencement the use of the fruits and a term, he may have, whilst the term exists and whilst he was so in possession, a free tenement, without putting himself into seysine, provided, however, a solemnity intervenes in the change itself, lest it should happen that the donation should fail from defect of proof. Likewise, one cause may be changed f. 32. into another, as if it be granted to a person, who has a free tenement, whilst he is so in seysine, that he should hold it in fee and thereupon have the property, as may be seen respecting those who hold in the name of dower either by the law of England or such like, for they may make a fee of a free tenement to the possessor; or because that, which a person has had for a term, may be given to him in fee, and what solemnity is to be observed, whether the donor and the donatory were present or were absent; [it does not follow] therefore that the cause and possession are changed of right, for it is one thing to have the right of using and the use of the fruits only, and quite another thing [to have] the dominion and the property, and hence it is safer that a solemnity should be adopted for the proof of the change; and if it be not adopted, the proof may be defective although the right be not defective. And the donor and true lord may, with the will of the tenant, change one cause of possession into another, without a change of the possession itself, nor is it necessary to resume a thing once given [in order] to change the cause, when once a person has been in possession, as if the donation ought to be made anew; because if any one has once obtained an entry either by intrusion or by disseysine, the true lord may concede

verus dominus concedere rem tenendam in feodo, sine mutatione possessionis, licèt injusta sit, multò fortiùs, si justa. Sed hoc facere possit sine præjudicio alterius, ut si primò facta fuerit donatio minori in feodo, cujus causa mutari non poterit ad damnum & præjudicium, sed ut ejus melioretur conditio, mutari non poterit infra ætatem ad damnum suum, s. quòd habeat ad vitam, quod ei prius datum fuit sibi & hæredibus suis, vel, quod ei datum fuit in feodo vel ad vitam, detur alteri ad damnum minoris. Est etiam ecclesia ejusdem conditionis, quæ fungitur vice minoris, sicut in cõm Lincolniæ de quadam ecclesia in Hebland,[1] ubi quæd terra primò data fuit psonæ & ecclesiæ & successoribus, & postea mutavit donationē donator de ecclesia in privatas psonas, s. personæ & hæredibus suis, quod esse non debuit, quia hoc esset in præjudicium & damnum ecclesiæ. Et sic poterit donator mutare causam possidendi de una causa in aliam sine pmutatione possessionis, & de psona in psonam nō poterit sine mutatione possessionis, nec de ecclesia ad privatā psonā cū dāno ecclesiæ.[2] Itē esto, q quis donationem fecerit viro de dote uxoris, quā habuit de donatione primi viri sui, & qualiter donatori[2] uti debet seysina sua, non enim poterit habere vacuā possessionē, nec uti p se. Et si uxor vellet resignare in manū dñi pprietatis dotē suā, ut inde feoffaret viř suū, sic esset donatio, q̃ est phibita, inter viř & uxorem, & fieret fraus Constitutioni.[3] Si autē vellet servitium uxoris attornare viro suo, non valeret, cùm oña quæ uxoris sunt, sunt ipsius viri, nec

[1] "in Hebland." MS. Rawl. has the reading Hoylond, probably the district of Holland, in Lincolnshire. The passage is omitted in Crewe and Gal.

[2] "cum damno ecclesiæ." Here MS. Rawl. inserts the passage "Item mutari potest," &c., omitted in the preceding page.

[3] "constitutioni," see p. 230. The Statute of Merton, 20 H. III., may be here intended. It is printed in the "Statutes of the Realm," 1810.

to him the land to be held in fee without any change of possession, although it be unjust, and much more so if it be just. But this he may be able to do without prejudice to another, as [for instance] if a donation has just been made to a minor in fee, for which reason it cannot be changed to his loss and prejudice, but that his condition may be ameliorated; it cannot be changed [whilst he is] below age to his loss, that is, that he should have for his life [only] what has been given to him for himself and his heirs, or that, what has been given to him in fee or for his life, should be given to another to the loss of the minor. A church is in the same condition, which fills the place of a minor, as in the county of Lincoln of a certain church in Hebland, where a certain land was given to a parson and the church and his successors, and afterwards the donor changed the donation from the church to private persons, that is, to the parson and his heirs, which ought not to be, for it would be to the prejudice and loss of the church. And so the donor will be able to change the cause of possession from one cause to another cause without a change of the possession, and he will not be able to change from one person to another person without a change of possession, nor from a church to a private person without a loss to the church. Likewise let it be, that a person has made a donation to a husband of the dower of his wife which she had by the donation of her first husband, and in what manner the donatory ought to use his seysine, for he cannot have a vacant possession, nor use it for himself. And if the wife is willing to resign her dower into the hand of the lord of the property, that he may thereupon enfeoff her husband, there would thus be a donation between husband and wife, which is prohibited, and a fraud would be worked against the Statute. But if he should wish to attourn the service of the wife to her husband, it would not be valid, since everything which belongs to the wife, belongs to the husband, nor has a wife power over herself, but

habeat uxor potestatē sui, sed vir, & unde dicitur q talis donatio valere nō debeat. Sed p̃mortua uxore, cū vir fuerit in possessione, si donator petierit vel ejus hæres, obstabit petenti exceptio donationis, si autē extra, vir p actionē obtinebit, si autē vir p̃moriatur, nō dabitur hæredi suo actio, ex quo uxor nūquā mutavit statū suū. Sed esto, q tantū fiat donatio uxori sine viro p se, de terra, quā in dotē tenuerit, benè valet, & tenet donatio, facta mutatione de libero teñto usq; in feod. Si autē utriq; illorum fiat donatio, & eoꝝ hæredibus separatis vel cōmunib⁹, benè valet donatio, facta mutatione cōmunis possessionis.

f. 32 b. 2. Si fiat donatio alicujus rei, excepta aliqua parte.

Item fit donatio alicujus rei, excepta aliqua parte certa, & tunc refert, utrum pars illa excipiatur in initio donationis, ut si dicat donator, Do tibi tale manerium cum pertinentiis, p hæc verba transfertur totum manerium, & cùm addat & dicat incōtinenti, excepta tali parte; ita extra capitur pars illa post donationē, quāvis ante traditionē non. Si autē sic dicat, Do tibi tale maneriū cum ptinentiis, retenta mihi tali parte, vel salva, aliud erit; quia in hoc casu nihil transfert ad donatorium, nisi id tantùm q transferri voluit, & ita illa pars, quam retinuit, semper cum eo est & semper fuit. Et unde, si hæres donatoris posteà donationem confirmaverit, nihil aliud confirmat p illam generalitatem donatorio, nisi rem illam, secundùm quod data fuerit, & cum eisdem ptinentiis, quia nihil aliud confirmat p illam generalitatem, nisi illud tantùm, quod fuit in donatione comprehensum, & unde, si in prima donatione excepta fuit advocatio ecclesiæ, illa generalis

her husband has; and hence it is said that such a donation ought not to be valid. But in the place of a deceased wife, when the husband is in possession, if the donor or his heir claim it, the exception of the donation will be in their way, but if he is out of [possession], the husband will obtain [possession] by an action; but if the husband predeceases [his wife], his heir will have no action, since the wife has never changed her state. But let it be, that a donation is only made to the wife without her husband for herself of land, which she holds in dower, the donation is valid and holds good, a change being made from a free tenement to a fee. But if the donation be made to them both and to their separate or common heirs, the donation is valid, a change having been made of their common possession.

f. 32 b. 2. If a donation be made of anything, with the exception of a particular part.

Likewise a donation is made of any thing, with the exception of a certain part, and then it is of importance, whether that part is excepted at the commencement of the donation; as, if the donor should say, I give you such a manor with its appurtenances, by such words the whole manor is transferred, and when he adds and says forthwith, except such a part: thereupon that part is excepted after the donation, though before the delivery not so. But if he should say, I give you such a manor with its appurtenances, retaining for myself or saving such a part, it will be different, because in this case he transfers nothing to the donatory, excepting that only, which he wished to be transferred, and thus that part, which he retained, is and always has remained with him. And hence if the heir of the donor has afterwards confirmed the donation, he confirms nothing by that generality to the donatory, excepting that very thing according as it has been given and with the same appurtenances, because he confirms nothing by that generality, excepting that only which was comprehended in the donation, and hence if in the first donation the advowson of a church has been excepted, that general exception does

confirmatio advocationem non comprehendit, & secundùm q̃ res data transfertur, ita confirmatur, quia confirmatio nihil confert donationi, nec detrahit, vel diminuit. Sicut poterit donator mutare causam possidendi de re donata in personam donatorii absque resumptione & mutatione possessionis, sed non transferre de persona in personā sine mutatione possessionis. Ita poterit donator in donatione sua cum consensu accipientis legem, conditionem, & mod̃ apponere, quem voluerit, dum tamen hoc non sit in p̃judicium aliorum, quamvis hoc esse possit in p̃judicium sui ipsius, & hæred̃ suor̃, quamvis hoc sit contra legē terræ & consuetudinem regni, cùm conventio quādoque legem vincat. Et simplex esse poterit donatio, mera, & pura sine cōditione, vel modo & totius rei, absque aliqua retentione de re ipsa, vel ejus p̱tinentiis, poterit enim quis dare rem, & partem rei retinere, vel partem de p̱tinentiis. Et quod fuit pars p̱tinentiarum post donationem factam, statim desinit esse de re illa vel de p̱tinentiis ejus, quantū ad donatorium. Itē potest quis dare totum jus, q̃ habet in re, s. tam possessionis, quā p̱prietatis ipsi donatorio & hæredibus suis quietè de se & hæredibus suis imperpetuū; & ista donatio dicitur simplex & pura, & tali donationi poterit donator, si voluerit, in initio donationis legem apponere & conditionem, ut res data post tempus ad ipsum revertatur cum jure possessionis tantùm, tenendi ad vitam suam, & ita, q̃ rei p̱prietas remaneat cum donatorio, vel ita, q̃ utrūq̱ jus tam possessionis, quàm p̱prietatis, remaneat cum donatorio, & q̃ usus fructus revertatur post temp^{o} ad donatorem, ad terminum vitæ vel annor̃. Item qui p̱prietatem habet

not comprehend the advowson, and according as the thing has been given, so it is confirmed, because the confirmation contributes nothing to the donation, nor takes away nor diminishes any thing from the donation. So likewise, the donor may change the cause of possession of a thing given to the person of the donatory without resumption or change of the possession, but may not transfer from person to person without a change of the possession. Thus a donor may in his donation with the consent of the acceptor affix a law or a condition or a mode according to his will, provided this is not to the prejudice of others, although it may be to the prejudice of himself and of his heirs, although this be against the law of the land and the custom of the country, since an agreement sometimes prevails against law. And the donation may be simple, absolute and pure, without condition or mode, and of the whole thing, without any retention of the thing itself or of its appurtenances, for a person may give a thing, and may retain a part of a thing or a part of its appurtenances; and that, which has been part of its appurtenances, after the donation has been made, forthwith ceases to be of it or of its appurtenances as regards the donatory. Likewise a person may give the whole of the right, which he has in a thing, that is, as well [the right] of possession as of property to the donatory himself and his heirs quietly as regards himself and his heirs in perpetuity, and such a donation is called simple and absolute, and to such a donation the donor, if he pleases, may attach at the commencement of the donation a law and a condition, that the thing given shall after a time revert to himself, with the right of possession only, to be held for his life, and so that the right of property shall remain with the donatory, or so that both the right of possession as well as of property shall remain with the donatory, and that the usufruct shall revert to the donor after a time, for the term of his life or [for a term] of years. Likewise he, who has the

tantùm, & alius habeat possessionem, sed liber tenementum, id, q habet, alteri dare potest, scilicet, ꝑprietatem, salvo tenēti libero tenemento suo, & jure possessionis ad vitam, & q post mortem ejus revertatur possessio ad ꝑprietatem, & quo casu atturnare debet ille, qui possidet, de servitio & aliis ei, qui ꝑprietatem habet, sicut priùs fuerit atturnatus donatori. Et eodem modo, si quis, habens utrumq; jus, concesserit alicui usum fructum, videlicet ad terminum, id, q habet, alteri concedere potest, salvo tamen firmario termino suo. Item si quis, habens utrūque jus ꝑprietatis & possessionis, concesserit alicui jus utrūque, tali adjecto modo, f. 33. ut post tempus revertatur ad ipsum possessio, tenendi ad vitam, & ut inde habeat liberum tenementum, remanente proprietatę cum donatorio, non statim ingrediatur donator quocunque colore, sicut causa hospitandi eodem die, nec in crastino, nec ulteriùs recenter utendo ut priùs, quia per hoc præsumitur quòd nunquam animum habuit recedendi à possessione, cùm utrumque concurrere debeat in donatione, videlicet, quòd donator possessionem relinquat animo & corpore. Et post longum tempus ex conventione si ingrediatur, si contra conditionem rejiciatur, habet assisam recuperandi ex conventione.[1] Si autem alius, s. donatorius contra ipsum assisam portaverit, habebit exceptionem ex conventione; & si fortè ingredi non possit, ex conventione habebit actionem. Item eodem modo, si ex recognitione post aliquod tempus facta in curia domini regis, quæ recordum habet, dum tamen recognitio & confessio vera sit, cùm oporteat confessionem in ea re factam esse veram & naturalibus convenire, valebit, quod actum

Glanville, l. 10, ch. 9. Britton, l. i. ch. xxviii. § 1. Fleta, 94.

[1] Et si forte ingredi non possit, ex conventione habebit actionem. MS. Rawl.

property only, whilst another has the possession and the freehold, that which he has, he can give to the other, namely, the property, saving the freehold and the right of possession for his life, and that after his death the possession may revert to the property, and in which case he, who possesses, ought to attourn for service and other things to him who has the property, just as he has formerly attourned to the lord. And in the same way if any person, having both rights, has granted the usufruct to any one, for instance for a term, he may grant to another what he has, saving always to the farmer his term. Likewise, if any one, having both the right of property and the right of possession, has granted to any one both rights with this additional modification, that the possession shall revert to himself after a time, to be f. 33. held for life, and that he may have a freehold of it, the property remaining with the donatory, the donor may not enter therein under any colour, as, for instance, for the sake of lodging there for the same day, and not using it on the morrow, nor further at any later time as before, because through this it is presumed, that he never had the intention of receding from the possession, since each condition ought to concur in the donation, for instance, that the donor has relinquished the possession as well in mind as in body. And if he should enter after a long time according to a covenant, if he be rejected contrary to the condition, he has an assise for recovering according to the covenant. But if another, that is the donatory, shall have brought an assise against him, he will have an exception upon the covenant; and if by chance he cannot enter, he will have an action upon the covenant. Likewise in the same manner, if after a recognition made after some time in a court of the lord the King, which is a Court of Record, provided the recognition and confession be true, since it is requisite that the confession made in that matter should be true and in harmony with natural things, what shall have been done will he valid. And if the

erit. Et si donator fortè confiteatur donatorium fuisse in seysina tempore confessionis factæ, cùm non sit, non valebit confessio, nec ea, quæ sequuntur, locum habere debent. Si autem donator post tempus longissimum, videlicet decem annorum vel ulteriùs, quod quidem tempus oblivionem inducit, qualiter tunc utatur ut dominus vel aliter, hoc donatorio non nocebit propter tempus. Item si in omnibus istis casibus supradictis, quandocumque ingrediatur donator, refert, si statum suum mutaverit omnino vel in parte, vel non mutaverit. Quia si omnino mutaverit statum suum, quòd, ubi priùs usus fuit ut dominus, modò utatur ut serviens, vel mercenarius, hoc donatorio non nocebit, quia donator omnino statum suum mutaverit, & valdè inhumanum esset, si filius vel amicus donatorem hospitio non reciperet, saltem ut hospitem, cùm se non ingerat sicut priùs, vel sicut dominum. Si autem ex toto vel in parte ingressus, non ex conventione vel recognitione, se gerit ut dominus, tunc aliud erit. Ut si quis donationem fecerit suo filio primogenito & hæredi, vel frater antenatus fratri suo postnato, ne per homagium excludatur hæres, vel frater antenatus à successione, si fortè donatorius sine hærede de se decesserit. Item poterit quis dare filio suo postnato sic, ut primogenitus non excludatur ab hæreditate, ut si quis ita dederit, Do tali filio meo postnato, pro servitio suo, tantam terram, tenendam de me tota vita mea sibi & hæredibus suis, & post mortem meam de capitalibus dominis feodi, pro servitio, quod ad terram illam pertinet; si postnatus præmoriatur, antenatus succedet ei, quia homagium non intervenit. Si autem sic, tenendum de capitalibus dominis, sic excludit se à custodia. Item

donor by chance admit, that the donatory was in seysine at the time of the admission being made, when he was not, the admission will not be valid, nor ought the things which follow to have any place. But if the donor after a very long period, for instance, of ten years or more, which time brings with it oblivion, shall use it in such manner, as if he were the lord or otherwise, this shall not hurt the donatory on account of the time. Likewise, if in all the above-said cases, whensoever the lord enters, it is of importance, if he has changed his state altogether in part, or has not changed it. Because if he has changed his state altogether, inasmuch as where he formerly used it as the lord, he now uses it as a servant or a mercenary, this shall not hurt the donatory, because the donor has altogether changed his state, and it would be very inhuman, if a son or a friend did not receive the donor with hospitality, at least as a guest, when he does not introduce himself as before, or as the lord. But if having entered either into the whole or into part, not upon an agreement or a recognition, he conducts himself as the lord, then it will be another thing. As if a person shall make a donation to his first-born son and heir, or the first-born brother shall make it to his after-born brother, lest the heir or the first-born brother should be excluded by homage from the succession, if perchance the donatory died without an heir. Likewise a person may give to his younger son, so that the first-born son shall not be excluded from the inheritance, as if any one shall have made a gift in these terms: I give to so and so my younger son, in return for his service, so much land, to be held of me during my whole life, to himself and his heirs, and after my death of the chief lords of the fee, in return for the service, which pertains to that land; if the younger son dies, the first-born will succeed to him, because homage has not intervened. But if [he gives it] in these terms, to be held of the chief lords, he excludes himself from the custody of it. Likewise if a donation be made in

si sic fiat donatio filio antenato à patre communi, pro servitio sive homagio, tenendum de capitalibus dominis, & talis in vita patris moriatur, postnatus, sive fuerit major sive minor, succedet ei, patre excluso à custodia, & si minor fuerit, ad dominum capitalem pertinebit custodia. Si autem major, tunc relevium.

f. 33 b.

Cap. XVI.

1. De distinctione chartarum.

Superiùs autē dictū est, q̄ fit donatio alicui ob causam præteritā, quia diu servivit, vel præsentem, quia benè servit, vel futurā, quia benè serviet, & talis donatio benè dici poterit servitii futuri remuneratio. Nunc de donationib⁹, quæ dantur p̄ homagio & servitio simul. Et sicut oportet, q̄ certa sit res quæ datur, ita oportet, q̄ certa sint servitia, quæ dantur p̄ re data. Et fiunt aliquando donationes in scriptis, sicut in chartis, ad perpetuam memoriam, p̄pter brevem hominum vitā, & ut faciliùs p̄bari possit donatio. Et tamen nihilominùs valet, licèt scriptura non intervenerit, dum tamen alias habeat p̄bationes.

2. De distinctione chartarum, alia regia, alia privatorum.

Et sciendum, quòd chartarum, alia regia, alia privatorum; & regiarum, alia privata, alia cōmunis, & alia universitatis. Itē privatarū, alia de puro feoffamēto & simplici, alia de feoffamento cōditionali, sive cōventionali, & secundùm oīa genera feoffamentorū fieri potest. Item privatarum, alia de recognitione pura vel cōditionali. Itē alia de quieta clamantia. Item alia de cōfirmatione. Et de hac materia inveniri poterit infrà, de finali cōcordia. Charta verò de puro feoffamento, est de simplici feoffamento, sine aliqua adjectione. Cō-

such manner to an earlier born son by a common father in return for service or homage, to be held of the chief lords, and such [son] dies in the lifetime of the father, the after-born son, whether he be of majority or a minor, shall succeed to him, the father being excluded from the custody, and if he be a minor, the custody shall belong to the chief lord. But if [he be] of majority, then a relief [shall belong to him].

Chapter XVI.

f. 33 b.

1. Of the distinction of charters.

It has been stated above that a donation is made to some one for a past consideration, because he has long served, or for a present one, because he is serving well, or for a future one, because he will serve well, and such a donation may be well termed a remuneration for future service. Now let us speak of donations, which are given in return for homage and for service together. And as it is requisite, that the thing given should be certain, so also is it requisite, that the services, which are given in return for the thing given should be certain. And donations are sometimes made in writing, as in charters for perpetual memory on account of the short life of man, and that the donation may be more easily proved. Yet it is notwithstanding valid, although no writing intervene, provided it has other proofs.

2. Of the distinction of charters, some royal, others of private individuals.

And it is to be known, that of charters some are royal, others are made by private persons; and of royal charters some are private, others are common, others are for a corporation. Likewise of private charters, some are for an absolute simple enfeoffment, others for a conditional or a conventional enfeoffment, and it may be for every kind of enfeoffment. Likewise of private charters, some are for an absolute, others for a conditional recognition. Likewise others are for quit-claim. Likewise others for confirmation. And on this subject [more] will be found below concerning final concordates. But a charter of absolute enfeoffment is of simple enfeoffment, without any addition. Conditional, as if a

Britton, l. ii. ch. viii. § 1. Fleta, 195.

ditionalis, ut si cōditio donationi sit adjecta, ut suprà videri poterit. Itē de recognitione, ut si tenens rem, quam tenet, & ab eo petatur, recognoverit jus esse petentis. Vel è converso, si petens rem, quam tenens tenet, recognoverit jus esse tenentis, tenēdū de se vel de alio, vel si illā remiserit, & quietū clamaverit. Itē de pura quieta clamantia, ut si petens purè remiserit, & quietā clamaverit tenenti terrā, quam petiit ut jus suum. Item charta de cōfirmatione, quæ alterius factum consolidat, & confirmat tantùm, & nihil novi attribuit, sed aliquando confirmat & addit. Item earum, quæ sunt privatæ & simplices de pura donatione, remanent donatorio & ejus hæredibus. Si autem cōmunes sint, duplicari debent, quòd quilibet habeat partem suam; vel deponi in æqua manu cuilibet partium, cùm necessariè fuerit exhibenda. Et si penes donatorium remāserit, donator, eo quòd sua interest, petat à donatorio exhibitionem, cùm donatorius fortè aliquid petat à donatore, q donator negaverit, vel de quo dubitetur, vel si donator petat & donatori^{9} negat, tunc donatori^{9} vel exhibeat instrumentum, vel ei denegetur actio, si petens fuerit, vel si ab eo petatur, remaneat indefensus, communis enim esse poterit aliqua ratione, ut si terra datur ad terminum annorum vel ad firmam. Item communis esse poterit alia ratione & ppetua, ut si quis donationem fecerit alicui de aliqua re, retenta sibi aliqua parte illius rei, ut si quis manerium dederit, retenta sibi quarta parte, vel de ejus pertinentiis. Ut si quis manerium dederit, retenta sibi advocatione ecf. 34. clesiæ vel hujusmodi, & si tenens dicat se totū tenere,

condition be added to the donation, as may be seen above. Likewise of recognition, as if holding a thing, which he holds, and it be claimed from him, he recognises that the right is in the claimant. Or conversely, if claiming a thing, which the tenant holds, he recognises the right to be in the tenant to hold it from himself or from another, or if he has released the thing and acquitted all claim to it. Likewise of an absolute quitclaim, as if a claimant has absolutely released and acquitted all claim to the land, which the tenant has claimed as his right. Likewise a charter of confirmation, which consolidates the act of another, and confirms it only and adds nothing to it, but sometimes it confirms and adds. Likewise of those, which are private and simple of absolute donation, they remain to the donatory and his heirs. But if they are common, they ought to be in duplicate, that each may have his part, or be deposited in the hand of a party, fair towards both parties, when they are to be exhibited of necessity. And if it remains with the donatory, let the donor, in a matter in which his own interest is concerned, claim the exhibition [of the charter] from the donatory, when the donatory by chance claims something from the donor, which the donor has denied, or about which there is doubt, or if the donor claims and the donatory denies, then let the donatory either exhibit the instrument, or let an action be refused to him, if he is the claimant, or if a claim be made against him, let him remain without defence, for it may be common in some manner, as if land be given for a term of years or to farm. Likewise it may be common in another way and perpetual, as if a person has made a donation to any one of any thing, having retained for himself some part of that thing, as if a person has given a manor, having retained for himself a quarter of it, or of its appurtenances. As if a person has f. 34.
given a manor and has retained for himself the advowson of the church or such like, and if the tenant says, that he

cùm donator petat, ostendere debet tenens chartam ad probandam exceptionem suam, quod si non fecerit, exceptio sua nulla, & amittat, sicut indefensus. Si autem chartam fortè exhibere non possit, quia illā ad manum nō̄ habuerit, de necessitate erit ad patriam recurrendum. Et eodem modo si casum allegaverit, & casum ꝑbaverit. Et sciendum, q̄ privatorum instrumentorū̄ tres sunt species, nam facit aliquando quis scripturam sibi ipsi, & tali scripturæ non erit fides adhibenda, aliquando facit contra se, & tali scripturæ adhibetur fides, aliquando tamen facit quis scripturam sibi ipsi & alii, & contra se & ꝑ se, quæ communis est, & de qua superiùs dicitur, & de quib⁹ agitur, de conventionibus factis inter privatas personas, & talis scriptura dicitur charta chirographata, quæ scinditur per medium, & una pars remanet parti uni, & altera alteri. Et unde quamvis non liceat alicui partium à conventionibus recedere, tamen non solet aliquando [1] necessitas imponi curiæ dñi regis, de hujusmodi conventionibus privatis discutere. Sed tamē̄, si quis à conventione recedat, succurritur alteri parti per actionem de cōventione, secundùm quod inferiùs dicetur. Et notandum quòd omniū̄ scripturarum privatarum, quib⁹ quis uti voluerit in judicio ꝑ se, copiā faciet adversario suo contra se: sed petens petere non debet, quòd tenentis instrumenta exhibeantur ad suam intentionem fundandā̄, cùm non teneatur armare adversarium suum cōtra se, nisi fortè instrumenta sua sint communia, nec etiam poterit tenens petere, quòd exhibeantur ei instrumēta petentis ad exceptionem suam ꝑbandam, secundùm q̄ prædictum est, maximè nisi sint communia.

Britton, l. ii. ch. viii. § 2. Fleta, 196.

[1] "aliunde" seems to be reading of MS. Rawl.

holds it all, when the donor claims, the tenant ought to show his charter to prove his exception, which if he fails to do, his exception is null, and he shall lose his cause, as if without defence. But if by chance he cannot exhibit a charter, because he has it not at hand, he must of necessity have recourse to the country. And in the same manner, if he shall have alleged a case, and has proved a case. And it must be known, that there are three species of private instruments, for sometimes a person makes a writing for himself, and to such writing no credit is to be given; sometimes he makes [a writing] against himself, and to such a writing credit is to be given; sometimes, however, he makes a writing for himself and another, and against himself and in favor of himself, which is a common [charter], and which has been spoken of above, and which has been treated of [in treating] of covenants made between private persons, and such a writing is called a chirograph charter, and which is cut through the middle, and one part remains with one party, and the other with the other [party]. And hence, although it is not allowable for any of the parties to recede from covenants, it is not usual at any time for a necessity to be imposed on the court of our lord the king to discuss private covenants of this kind. But nevertheless, if any one recedes from a covenant, the other part is aided by an action on the covenant, according as will be explained below. And it is to be noted that of all the writings, which a person wishes to use in a judicial proceeding on his own behalf, he must furnish a copy to his adversary against himself, but the claimant ought not to claim that the title-deeds of the tenant should be exhibited in order to found his own plea, since he is not bound to arm his adversary against himself, unless by chance his title-deeds are common, nor can the tenant claim that the title-deeds of the claimant be exhibited to him, that he may prove his exception, according to what has been above said, unless indeed they are common.

3. Quod de chartis regiis non debent justitiarii disputare, nec eas judicare. Britton, l. ii. ch. viii. § 3. Fleta, 196.

De chartis verò regiis & factis regum, non debent nec possunt[1] justiciarii, nec privatæ personæ disputare, nec etiam, si in illa dubitatio oriatur, possunt eam interpretari, & in dubiis & obscuris, vel si aliqua dictio duos contineat intellectus, domini regis erit expectanda interpretatio & voluntas, cùm ejus sit interpretari, cujus est concedere, & etiam si omnino sit falsa ꝑpter rasuram, vel quia fortè signum appositum est adulterinum, melius & tutius est, quòd coram ipso rege procedatur ad judicium. Item nec factū regis, nec chartam potest quis judicare, ita quòd factum domini regis irritetur. Sed dicere poterit quis, q̄ rex justitiam fecerit, & benè, & si hoc, eadem ratione quòd malè, & ita imponere ei quòd injuriam emendet, ne incidat rex & justic. in judicium viventis Dei ꝑpt̄ injuriam. Rex autem habet superiorem, Deum, s. Item legem, ꝑ quam factus est rex. Item curiam suam, videlicet comites, barones, quia comites dicuntur quasi socii regis, & qui habet socium, habet magistrū, & ideò si rex fuerit sine fræno, i. sine lege, debent ei frænum ponere, nisi ipsimet fuerint cum rege sine fræno, & tunc clamabunt subditi & dicent, Dñe Jesu Christe, in chamo & fræno maxillas eorum cōstringe; ad quos Dominus, Vocabo super eos gentem robustā & longinquam & ignotā, cuj⁹ linguam ignorabunt, quæ destruet eos, & evellet radices eorum de t̄ra, & à talibus judicabuntur, quia subditos noluerunt justè judicare; & in fine, ligatis manib⁹ & pedib⁹ eorum, mittet eos in caminum ignis, & tenebras exteriores, ubi erit fletus & stridor dentium.

Britton, Prolegom.

f. 34 b.

[1] "nec possunt," omitted, MS. Crewe.

3. That in respect of royal charters the justiciaries ought not to dispute them, nor to adjudicate on them.

But concerning royal charters and the acts of kings, neither the justiciaries nor private individuals ought or may dispute them, nor even if there be any doubt about them, may they interpret the doubt, but in doubtful or uncertain [passages], or if any phrase contains two meanings, the interpretation and will of our lord the king is to be awaited, since it is for him who has made the grant, to interpret it, and even if it be altogether false on account of an erasure or because perhaps a forged seal has been affixed, it is better and safer that the proceedings for judgment should be before the king himself. Likewise no one can adjudicate upon an act of the king or a charter [of the king], so that the act of the king should be made void. But some one may say, that the king should do justice, and well so, and if so, in the same way, if [he has done it] ill, and so would impose upon him [the duty] that he should amend an injustice, lest the king and the justiciaries should fall under the judgment of the living God on account of injustice. But the king has a superior, for instance, God. Likewise the Law, through which he has been made king. Likewise [he has] his court, namely, counts, barons, because the counts are so called as being as it were the associates of the king, and he who has an associate, has a master, and therefore if the king be without a bridle, that is without law, they ought to put a bridle upon him, unless they themselves are together with the king without a bridle, and then their subjects will exclaim, and will say, O Lord Jesus Christ, bind their jaws with a rein and with a bridle; to whom the Lord will say, I will call against them a nation strong and far distant and unknown, whose tongue they shall not understand, who shall destroy them and pluck out their roots from the earth, and by such they shall be judged, because they have been unwilling to judge their subjects justly; and in the end with their feet and hands bound he shall send them into a furnace of fire, and into outer darkness, where there shall be weeping and gnashing of teeth. f. 34 b.

4. Cum res certa dari debeat, oportet quod certa sint servitia, quæ venire debent in compensationem pro ea data.

Si privata ꝑsona fecerit donationē de re certa, ex causa futura, oportet ꝙ certa sint ea, quæ donatori præstari debent in retributionē ꝑ re data, ut si fiat donatio ꝑ homagio & servitio, vel ꝑ servitio tantùm sine homagio, fieri enim poterit donatio ꝑ homagio & servitio ꝑpriè de feodo militari, impropriè verò fit homagium de sockagio, cùm inde fieri deberet tantùm fidelitas, & non homagium, & si de facto fiat homagiū, non tamen sequitur ꝑpt̄ hoc, ꝙ ad dñm capitalē ꝑtineat custodia & maritagiū, quia custodia & maritagium non semper sequitur homagium, quia ad quem hujusmodi ꝑtineant, ꝑ homagium non determinetur, sed ꝑ servitium, secundùm ꝙ tenementum tenetur ꝑ servitium militare, vel ꝑ sockagium. Ut, si quis donationem fecerit filio suo primogenito & hæredi, vel frater antenatus fratri suo postnato, ne ꝑ homagiū excludatur hæres vel frater antenatus à successione, si fortè donatori[9] sine hærede de se decesserit. Itē, potest quis dare filio suo postnato, sic, ut primogenitus non excludatur ab hæreditate. Ut si quis ita dederit, do tali filio meo postnato ꝑ servitio suo tantā terrā, tenendā de me tota vita mea sibi & hæredib[9] suis, & post mortē meā, de capitalib[9] dñs ꝑ servitio, ꝙ ad illā terrā ꝑtinet; si postnat[9] præmoriatur, antenatus succedet ei, quia homagiū non intervenerit. Si autē sic; tenendā de capitalib[9] dominis, sic excludit se à custodia. Item si fiat donatio filio antenato ab ipso patre cōmuni, ꝑ servitio sive homagio, tenendum de capitalibus dominis, & talis in vita patris moriatur, postnatus frater, sive fuerit major, sive minor succedit, patre excluso à

4. When a thing certain ought to be given, it is requisite that the services, which ought to come into compensation for the thing given, should be certain.

If a private person has made a donation of a thing certain for a future consideration, it is requisite that those things, which ought to be furnished in retribution to the donor for the thing given, should be certain, as, if a donation be made for homage and service, or for service only without homage, for a donation may be made properly of a military fee for homage and service, but homage would be improperly done for a sockage [tenure], since fealty only, and not homage, should be paid for that, and if in fact homage should be done, it does not follow on that account that the custody and maritage appertains to the chief lord, for the custody and maritage does not always follow the homage, because it is not determined, to whom these things belong, by the homage but by the service, according as a tenement is held by military service or by sockage. As if a person has made a donation to his first born son and heir, or an earlier born son has done so to a later born son, lest by the homage the heir or earlier born son should be excluded from the succession, if by chance the donatory should die without an heir from himself. Likewise a person may make a gift to his later born son, so that the earlier born son shall not be excluded from the inheritance. As if a person should make a gift in these terms: I give to my later born son in return for his service so much land, to be held of me during all my life by himself and his heirs, and after my death of the chief lords in return for the service, which appertains to that land: if the later born [son] predeceases, the earlier born will succeed to him, because homage has not intervened. But if [the land be given] in this manner: to be held of the chief lords, he thereby excludes himself from the custody. Likewise, if a donation be made to an elder born son by a common father, for service or homage, to be held of the chief lords, and such son dies in the lifetime of the father, the later born brother, whether he is of age or a minor will succeed, the father having been

custodia. Et si minor fuerit, ad dñm capitalem ptinebit custodia & maritagiū. Si autem major, tunc relevium. Et qui teneantur ad homagium & fidelitatē, & qui non, & quæ sequūtur homagia, pleniùs dicetur inferiùs, de homagiis.

5. De verbis et clausulis contentis in charta. Britton, l. ii. ch. viii. § 4. Fleta, 196.

Fit autem donatio in scriptura p hæc verba: Sciant præsentes & futuri, q ego talis dedi & concessi, & hac præsenti charta mea cōfirmavi tali, p homagio & servitio suo, tantā terrā cum ptinentiis in tali villa, &c. ut infrà. Et unde p hoc, q dicit, Ego talis, vult quòd certa psona cōprehendatur in donatione quæ dat, & per hoc q dicit, dedi, vult q res data fiat accipientis, & per hoc q dicit, concessi, perpendi poterit ex hoc, quòd donationi consensum præbuit, quia non multùm differt dicere cōcessi, quàm dicere consensi. Item p hoc q dicit, præsenti charta mea confirmavi, per hæc innuit, quòd vult, quòd voluntas sua, per quam res transfertur ad donatorium, & quæ firma esse debet, præsens[1] charta, sigilli sui munímine, confirmetur. Est enim confirmare, id, quod priùs firmum fuit, simul firmare. Item per hoc q dicit, tali, vult q certa psona exprimatur, cui fit donatio. Hoc videtur[2] contrarium ei, quod dicitur suprà de pluribus bastardis filiis de concubina, &c. Item quòd fieri poterit donatio pluribus pueris, ubi dicitur, quòd pueris natis & nascituris fieri poterit donatio; sed non nominati & nascituri sunt incertæ personæ, ergo incertis personis fieri poterit donatio; & ita non est necesse, quòd certa persona

[1] "præsenti," MSS. Rawl. and Crewe.

[2] "Hoc videtur" down to "incertæ personæ, ut ibi" is omitted in MSS. Rawl and Crewe, MS. Rawl.

excluded from the custody. And if he be a minor, the custody and the maritage will pertain to the chief lord. But if he be of age, then a relief will pertain to him. And who are bound to homage and to fealty, and who not, and what things follow homage, will be more fully stated below on the subject of homages.

5. Of the words and clauses contained in a charter.

A donation also is made in writing in these words: Let it be known to those present and to the future, that I, so and so, have given and granted and by this my present charter have confirmed to so and so, in return for his homage and service, so much land with the appurtenances in such a vill, &c. as follows. And hence by these words, when he says, "I, so and so, &c.," he intends that a certain person should be comprehended in the donation which he gives, and by these words, when he says, "I have given," he intends that the thing given should become the property of the acceptor, and by these words, when he says, "I have granted," it may be inferred from them, that he has given his consent to the donation, for there is not much difference in saying, "I have granted," from saying, "I have consented." Likewise by these words, when he says, "I have con- "firmed by this my present charter," by this he intimates that he intends, that his intention, by which the thing is transferred to the donatory, and which ought to be firm, shall be confirmed by the present charter, with the assurance of his seal. For to confirm is to affirm together that, which was firm beforehand. Likewise by the words, when he says, "to such an one," that a certain person be expressed to whom the donation is made. This seems contrary to what has been said above concerning several bastard sons by a concubine. Likewise that a donation may be made to several sons, when it is said, that a donation may be made to sons born and to be born: but those not named and to be born are uncertain persons, therefore a donation may be made to uncertain persons, and so it is not necessary, that a cer-

comprehendatur in donatione, cujus contrarium innuitur hîc. Sed non est contrà, quia licèt dicatur, quòd donator vult exprimere certam personam, cui facit do-
f. 35. nationem, cùm eam tali ꝑsonæ fecit, ut hîc; non tamen negat ꝑ hoc, quin fieri possit incertæ personæ, ut ibi.[1] Item ꝑ hoc quod dicitur, ꝑ homagio & servitio suo, vult quòd certa sit causa, ꝑ qua fit donatio. Et idem, si sic dicat, ꝑ servitio sine homagio. Item per hoc q̃ dicit, tantam terram, vult q̃ certa res deducta sit in donatione, & certæ ꝑtinentiæ, quæ tunc ꝑtinuerunt, cùm res venit in donationem. Item per hoc q̃ dicit, in tali villa, vult q̃ certus locus cõprehendatur, in quo
Britton, l. ii. ch. viii. § 5. res sita est, quæ datur. Item contineri debet, habendam & tenendam tali & hæredibus suis generaliter, vel
Fleta, 197. cum coarctatione hæredum, liberè & quietè, honorificè, benè & in pace, vel in liberum maritagiū, tali & hæredibus suis talib⁹, vel tali abbati, vel priori, & successoribus suis, in liberam & purā eleemosynā. Itē tali & hæredib⁹ suis vel assignatis, secundùm quod superi⁹ videri poterit in exemplo manifestè. Et ꝑ hoc q̃ dicitur, tali & hæredib⁹ suis, vult donator, quòd cõprehendantur certæ ꝑsonæ, ad quas descẽdere debet res donata post mortẽ donatorii ꝑ modum donationis, et per q̃ ꝑpendi poterit, si tales hæredes defecerint, quòd ꝑ modum tacitū reverti debeat res donata ad donatorẽ. Item ꝑ hoc q̃ dicit, liberè, non vult quòd rei datæ servit⁹ imponatur; ut si quis velit uti aliquo jure in re data, ad quam servit⁹ non pertinet, neq̃ usus. Item per hoc quod dicit, quietè, vult quòd quietem habeat

[1] The passage from "Hoc videtur "contrarium" down to "ut ibi," which is omitted in MSS. Rawl. and Crewe, has the appearance of an interpolation in the original text.

tain person be comprehended in the grant, the contrary of which is here intimated. But it is not contrary, because, although it be said, that the donor intends to express a certain person, to whom he makes the donation, f. 35. when he makes it to such a person, as here ; he does not deny by these words, that it may be made to an uncertain person, as there. Likewise by these words, when it is said, in return "for homage and his service," he intends that there should be a certain consideration, for which the donation is made. And the same if he should say thus, "for service without homage." Likewise by these words, when he says, "so much land," he intends that a certain thing be brought into donation and certain appurtenances, which then appertained to it, when the thing came into donation. Likewise by these words, when he says in such a vill, he intends that a certain place be comprehended, in which the thing given is situated. Likewise there ought to be contained [a provision], "to have and to hold to so and so and his heirs "generally," or with a limitation as to heirs, "freely "and quietly," "honourably," "well and in peace," or "in free maritage," "to so and so, and to such of his "heirs," or "to such an abbot or prior and his successors "in free and pure alms." Likewise to "such and his "heirs and assigns," according as may be seen above in the example manifestly. And by these words, when he says, "to so and so and to his heirs," the donor intends, that certain persons should be comprehended, to whom the thing given ought to descend after the death of the donatory through the mode of donation, and by which it may be inferred, if such heirs should fail, that through a tacit mode the thing given ought to revert to the donor. Likewise by this word, when he says, "freely," he does not wish that a service should be imposed on the thing given; as if any one should wish to use any right in a thing given, to which neither the service nor the use pertains. Likewise by this word, when he says

& pacem, quòd uti possit donatorius re data pacificè, & non inquietetur. Est enim quies idē q requies, sive pax, & si componatur cum hac præpositione (in) erit ibi inquies, s. non quies. Et non refert ad hoc, quòd non possit uti omnino vel minus commodè, secundùm quod inferiùs videri poterit, de cōsuetudinibus & servitiis præstandis in assisis.

6. De servitiis et consuetudinibus nominatis in charta. Britton, l. ii. ch. viii. § 4. Fleta, 197.

Item dicitur, reddendo inde p annum tantum, ad certos terminos tales, & faciēdo inde talia servitia, & tales cōsuetudines, quæ omnia debent esse certa & expressa in charta, quib⁹ expressis & in charta nominatis, cùm infinita sunt genera servitiorum & cōsuetudinum, alia oĩa servitia & cōsuetudines, quæ expressa non sunt, tacitè videntur esse remissa. Et impossibile esset oĩa in charta exprimere, ad quæ donatori⁹ non teneretur, licèt charta expressè nō acquietet, satis enim acquietat, ex quo specialiter nō onerat. Itē dicitur, p omni servitio, consuetudine seculari, exactione & demanda, p quam generalitatem videtur expressè remittere oĩa alia servitia, cōsuetudines, & demandas seculares, q̃ ad dn̄m pertinēt de tenemento, licèt hoc in charta expressè non contineatur. Sunt enim servitia et cōsuetudines, quæ ptinent ad dn̄m feodi, et cōsuetudines et servitia, quæ ptinent ad regē, sicut sectæ ad justitiam faciendam per breve de recto, & ad pacem, sicut de latrone judicando, et p aforciamento curiæ in prædictis. Ad dn̄m verò fundi donatorem, pertinent servitia ratione rei datæ, sicut reddit⁹, sive debeatur aurum sive argētum in pecunia numerata, ut si dicatur, red-

" quietly," he intends that he should have peace and quiet, that the donatory may be able to use the thing peaceably, and that he may not be disquieted. For quiet is the same as repose or peace, and if the word " quiet " is compounded with this preposition (" *in* "), there will be there " inquiet," that is " not quiet." And it is not of importance for this [object] that he cannot use it in every manner or with diminished convenience, according as will be discussed below, concerning the customs and services to be performed in the assises.

6. Of the services and the customs named in a charter.

Likewise it is said, " in rendering thence so much " per year," " at certain settled terms," and " in doing " thence such services and such customs," all of which ought to be certain and expressed in the charter, which being expressed and named in the charter, since there are infinite kinds of services and customs, all other services and customs, which are not expressed, seem to be silently remitted. And it would be impossible to express in a charter all, to which the donatory should not be bound, although the charter does not expressly acquit him, since it sufficiently acquits him, when it does not burden him. Likewise it is said, for every service, secular custom, exaction or demand, by which generality the charter appears expressly to remit all other services, customs, and secular demands, which appertain to the lord from the tenement, although this be not expressly contained in the charter. For there are services and customs, which appertain to the lord of the fee, and services and customs which appertain to the king, such as suits to do justice, by a writ of right, or to [maintain] peace, as to adjudicate upon a robber, and for the extraordinary summoning of a court in matters aforesaid. But to the lord the donor of the estate there appertain services by reason of the thing given, such as rents, whether there be due gold or silver in counted money, as if it be said, by rendering thence yearly ten golden

dendo inde p annum x. aureos vel argenteos, sive x. solidos, vel si servitium consistat in fructu, ut si dicatur, reddendo inde p annum x. coros tritici, sive x. quarteria vel hm̃oi, si servitium cōsistat in solido, si autē in liquido, ut si dicaī, reddend' inde p annū x. dolia vini, vel x. cados olei. Itē si certa res repromittaī, vel sub disjunctione, ut si dicaī, reddend' inde
f. 35 b. p annū q̃dā calcaria deaurata vel sex denarios, vel unam libram piperis, vel cumini, vel ceræ, vel quasdam chirothecas, vel tot denarios, & in quo casu, tenens habet electionem, utrum istorum solvere velit, & unum solvendo liberatur, & hæc omnia & plura alia consistunt in redditibus & in redditionibus. Est tamen quoddam genus redditus, qui datur ab aliquo, percipiend⁹ de re aliqua certa, cum districtione vel sine, qui non dicitur servitium, sed quasi ex feoffamento liberum tenementū, de quo infrà dicetur, de assisa. Item sunt quædā servitia, quæ pertinent ad dm̃ capitalem, & quæ cōsistunt in factionib⁹, & fiunt ex consuetudine, de t̃mino in t̃minum, et de quib⁹ oportet, quòd fiat mentio in scriptura, et alioquin peti non poterunt, ut si dicatur, & faciendo inde sectam ad curiam domini sui et hæredum suorum, de quindena in quindenā, vel de trib⁹ septimanis in tres septimanas, quolibet anno, de t̃mino in t̃minum. Item faciendo inde tot aruras & tot messuras, tot falcationes, & quæ oĩa ptinent ad dominos feodi, ex tenementis sic datis liberis hominib⁹, et pveniunt ex tenementis, et dici possunt feodalia, sive prædialia servitia, et non personalia, nisi ratione prædiorum et tenementorum. Item poterit quis feoffare alium per serjantiā, quæ quidem multiplex esse poterit, et unde quædam pertinent ad ipsum dm̃ feoffantem, et quædam ad ipsum regem, ut si dicatur, p

or silver coins, or ten shillings, or if the service consist in produce, as if it be said by rendering thence yearly ten cores of wheat or ten quarters, or such like, if the service consist in something solid, but if in something liquid, as if it should be said by rendering thence yearly ten barrels of wine, or ten casks of oil. Likewise if a certain thing is promised in return or disjunctively, as if it should be said, by rendering thence yearly certain gilded sandals or six pennies, or one pound of pepper or f. 35 b.
of cummin, or of wax, or certain gloves or as many pennies, and in case the tenant has the election, which of these he wishes to pay, and by paying one, he is freed, and all these and several other things consist in rents and returns. There is likewise a certain kind of rent, which is paid by some one, to be derived from a certain thing, with distraint or not, which is not termed a service, but is as it were a free tenement upon enfeoffment, of which more will be said below [in treating] of the assise. Likewise there are certain services which appertain to the chief lord, and which consist in doing certain things, and they are done according to custom, from term to term, and respecting which it is requisite that mention be made in writing, and otherwise they cannot be claimed, as if it be said, and in doing thenceforth suit (attendance) at the court of his lord and of his heirs, from fortnight to fortnight, or from three weeks to three weeks, in every year, from term to term. Likewise in doing thenceforward so many ploughings and so many mowings, so many reapings, and all of which appertain to the lords of the fee, from tenements so given to free men, and they are forthcoming from the tenements, and they may be called feudal or prædial services, and not personal, except in respect of lands and tenements. Likewise a person may enfeoff another by serjeanty, which may be of many kinds, and hence some things appertain to the lord himself the feoffor, and some things to the king himself, as if it be said, by the

Britton l. ii. ch. ii. § 6.

servitium equitandi cum dño suo, vel dña, qui propriè dicuntur Rodknightes, vel per servitia tenendi placita dominorum suorum, vel portandi brevia infra certa loca, vel pascendi leporarios & canes, vel mutandi aves, vel inveniendi arcus & sagittas, vel portandi, et de iis serjantiis non poterit certus numerus comprehendi. Et hujusmodi servitia oĩa dici possunt intrinseca, quia in chartis et in instrumentis sunt exprimenda, et dñs capitalibus remanebunt. Et cùm ꝑpt̃ exercitum regis & patriæ tuitionem non fiunt; ideo ex talibus servitiis nullum cōpetere deberet maritagium, nec custodia domino capitali, non magis quàm de socagio. Ecce[1] hîc dicitur quòd ex parvis serjantiis, quæ non respiciunt regem nec patriæ defensionem, ut equitare cum dño vel dña, & portare brevia et hujusmodi, non habebitur maritagium, cujus contrarium ponit per exemplum. Contrarium autem habetur de quadam abbatissa de Berking inter placita, quæ sequuntur regem, anno regni regis Henrici[2] coram W. de Raleighe, & quæ recuperavit custodiam & maritagium de hærede cujusdam tenentis sui, qui tenebat tenementum suum in manerio de Berking per servitium equitandi cum ea de manerio in manerium, quod quidem S. de Segrave non approbavit. Sunt & alia genera serjantiæ, quæ ad dñm capitalem non pertinent, sed ad dominum regem, ꝑ exercitu regis ad patriæ tuitionem vel defensionem, & hostium deprehensionem; ut si quis ita feoffatus fuerit, s. per serjantiã inveniendi domino regi unum hominem vel plures, ad eundum cum eo in expeditionem ad exercitum, equites vel pedites, cum aliquo genere armorum, & ex tali serjantia competit domino capitali, sive de domino rege tenuerit, sive de alio, custodia & maritagium hæredis, quod quidem non

[1] "Ecce hic dicitur" down to "per exemplum." This passage is not found in MSS. Rawl. or Crewe.

[2] "anno regni H." followed by a blank space is likewise the reading of MS. Rawl., no year being inserted. Also of MS. Crewe, p. 24, col. 1.

service of riding with his lord or his lady, which are properly termed "Rodknights," or by the services of holding the pleas of their lords, or of carrying their writs within certain places, or of feeding greyhounds and dogs, or of mewing up birds, or of finding bows and arrows, or of carrying, and of these serjeanties a certain number cannot be comprehended. And all these services may be termed intrinsic, because they are [required] to be expressed in charters or in deeds, and will remain for the chief lords; and since they are not done for the king's army and for the defence of the country, therefore from such services no maritage ought to result, nor custody to the chief lord, not more than from sockage. Lo! here it is said that from petty serjeanties, which do not regard the king nor the defence of the country, as to ride with the lord or the lady, and to carry writs and such like, no maritage shall be had. But the contrary is held concerning a certain abbess of Berking amongst the pleas which follow the king in the — year of the reign of king Henry, before William de Raleigh, and who recovered the custody and the maritage of the heir of a certain tenant of hers, who held his tenement in the manor of Berking by the service of riding with her from manor to manor, which Stephen de Segrave did not approve. There are also other kinds of serjeanty, which do not appertain to the chief lord, but to the lord the king, for the army of the king, for the protection and defence of the country, and for the detection of enemies; as if a person was enfeoffed in this manner, namely, by the serjeanty of finding for the lord the king one or more men to go with him on an expedition to the army, horse or foot, with some kind of armour, and from such serjeanty the chief lord is entitled to the custody and maritage of the heir, whether he holds of the lord the king or of some other, which could not be maintained

esset tenendum in casibus prædictis. Illud idem servatur, si quis teneat per servitium inveniendi domino
f. 36. regi, certis locis & certis temporibus, unum hominem, & unum equum, & saccum cum brochia[1] ꝑ aliqua necessitate vel utilitate exercitum suum cõtingente.

7. Quæ servitia dicuntur forinseca et quare.

Item sunt quædam servitia, quæ dicuntur forinseca, quāvis sunt in charta de feoffamētis expressa & nominata, & quæ ideò dici possunt forinseca, quia ꝑtinēt ad dominum regem, & non ad dominum capitalem, nisi cùm in ꝑpria persona ꝑfect⁹ fuerit in servitio, vel nisi cùm ꝑ servitio suo satisfecerit dño regi quocunq; modo, & fiunt in certis temporib⁹, cùm casus & necessitas evenerit, & varia habent nomina, & diversa. Quandoq; enim nominantur forinseca, largè sumpto vocabulo, quoad servitium domini regis, quandoq; scutagium, quandoq; servitium domini regis, & ideò forinsecum dici potest, quia fit & capitur foris, sive extra servitium, q̃ fit dño capitali. Item scutagium, q̃ talis præstatio ꝑtinet ad scutum, q̃ assumitur ad servitiū militare. Item dicitur regale servitium, quia specialiṫ ꝑtinet ad dominum regem, & non ad alium, & secundùm q̃ in cõquestu fuit adinventum, et hujusmodi servitia ꝑsolvuntur ratione tenementorū, et non personarū, quia ex tenementis ꝑveniunt, ut si dicatur in charta, faciendo inde forinsecum servitiū, vel regale servitiū, sive servitum domini regis; q̃ idem est, secundū modum feoffationis, s. quantum pertinet ad feodū uni⁹ militis, vel duorum in eadem villa, vel de eodem feodo, vel ad scutagia, c. s. ij. marcas vel tres, et ad plus, plus, & ad minus, minus. Et quia tale servitium forinsecum

[1] "saccum cum brothia," MS. Rawl.; "saccum cum brochia," MS. Crewe. *Brochia* seems to have been an iron needle or spit to fasten the neck of the sack. Spelman conjectures, that it was a can or pitcher to hold liquids, as the sack was to carry dry things.

in the cases aforesaid. The same thing is observed, if any one holds by a service of finding for the lord the king at certain places and at certain times, one man and one horse and a sack with a brooch for any necessity or utility touching his army. f. 36.

7. What services are called forinsic, and wherefore.

Likewise there are certain services, which are called forinsec, although they are expressed and named in a charter of enfeoffment, and which may be called forinsic for this reason, because they appertain to the lord the king, and not to the chief lord, except when in his own person he has made a journey in the service [of the king], or unless he has on behalf of his own service satisfied the lord the king in any manner, and they are done at certain times, when the occasion and the necessity has arisen, and they have various and divers names. For sometimes they are called forinsic, the term being taken in a wide sense as regards the service of the lord the king, and sometimes scutage, and sometimes the service of the lord the king, and it may for this reason be termed forinsic, because it is done and is taken abroad, or beyond the service, which is done for the chief lord. Likewise [it is termed] scutage, because such supplying of it appertains to the shield, which is assumed for military service. Likewise it is called a royal service, because it specially appertains to the lord the king, and not to another, and according to what was introduced at the Conquest, and these kinds of service are performed by reason of the tenements, and not by reason of the persons, and because they are forthcoming from the tenement, as if it be said in the charter, by making thence a forinsic service or a royal service, or a service of the lord the king, which is the same thing according to the mode of enfeoffment, that is, as much as appertains to the fee of one soldier, or of two in the same vill, or from the same fee, or to scutages, that is to say, two marks or three, and where more, more; and where less, less. And because such a forinsic service does not always remain

nō semp manet sub eadem quantitate, sed quandoq; præstatur ad plus, quādoq; ad minus, ideò de qualitate regalis servitii & quantitate fiat mentio in charta, ut tenens certum tenere possit, quid & quantum psolvere teneatur; q quidem dici poterit de sectis, quæ ptinent ad dñm capitalem, cùm possint ibi varia & diversa tempora denotari, de quibus fit mentio suprà. Sed si sic dicatur, reddendo inde per annum tantum, & faciendo tales sectas p omni servitio, excepto regali servitio, vel salvo forinseco, tunc videndum erit inprimis, si feodum illud in ipsa donatione forinsecum debuit ab initio vel non. Si autem nullum debuit ab initio, nec sit certum forinsecū in charta expressum, nunquā præstabitur, nec peti poterit ppt̄ incertitudinē. Si autem ab initio nullum, sed in ipsa donatione cōvenerit, q detur scutagium, & in charta exprimatur certum, erit omnino præstādum. Et sicut poterit donator liberiùs dare, quàm ipse tenuerit, et onerare se ipsum et hæredes suos erga suos feoffatores, ita poterit suum feoffatū onerare ad plura servitia et ad alia, quàm ipse teneatur feoffatori suo. Poterit enim de socagio facere servitium militare, & è converso, si ita convenerit ab initio inter ipsum et feoffatum suum. Sed quid, si feodum feoffatoris non debeat forinsecum, & donator dederit p forinseco, tunc refert, utrum certum & expressum, vel non. Si autem incertum, tunc tale quid peti nō poterit; si autē forinsecum debuit ab initio, sed tamē in charta donationis nō exprimatur certū, videtur prima facie, q peti nō possit? Sed revera sic erit intelligēdum, q tale & tātumdem præstādū sit, quātum præstāt alii, qui tenent teneñta in eadē villa, & de eodē feodo p servitiū militare. Itē potest quis

the same as regards quantity, but is sometimes furnished to a greater extent, and sometimes to a less extent, for that reason mention should be made in the charter of the quality and the quantity of the royal service, that the tenant may know for certain what and how much he is bound to perform, which may also be said of the suits, which appertain to the chief lord, since various and different times may be there denoted, respecting which mention is made above. But if it be thus said, "by "rendering thence by the year so much and by doing "such suits for every service, excepting the royal ser- "vice, or saving the forinsic service," then it must be seen in the first place whether that fee in the actual donation was charged with a forinsic service from the commencement or not. But if it owed nothing from the commencement, and there is not any certain forinsic service expressed in the charter, it shall never be performed, nor can it be claimed, on account of its uncertainty. But if from the commencement [no service was due], but in the actual donation it was agreed that scutage should be performed and a certain [scutage] is expressed in the charter, it will have to be performed under all circumstances. And as the donor may grant more freely than he held, and charge himself and his heirs towards his feoffors, so he may charge his feoffee with more services, and other than those which he owes to his feoffor. For he may make out of a sockage [tenure] a military tenure, and conversely, if it has been so agreed upon between himself and his feoffee. But what if the fee of the feoffor does not owe any forinsic [service], and the donor has granted it in consideration of a forinsic service, then it matters whether it be certain and expressed or not. But if it be uncertain, then any such service cannot be claimed; but if a forinsic [service] was due from the commencement, and nevertheless no certain [service] is expressed in the charter of donation, it appears at first sight that it cannot be claimed. Like-

dare teneñtum, quod ipse tenuit per servitium militare, tenendum in villenagium p villanas consuetudines
f. 36 b. & servitia, dum tamen certa & expressa. Si autem dicat, quòd dat ita liberè, sicut aliqua terra liberiùs dari possit, hoc intelligendum erit, quantum ꝑtinet ad donatorem, & erga suum feoffatorem defendet, quantum ad ipsum ꝑtinebit. Si autem res data tam erga alios, quàm erga dominum suum capitalē obligata fuerit, nō tenetur ad hoc, ꝑ hæc verba ipsum erga alios acquietare, nisi specialiť in se illud onus susceperit, & tunc versus omnes defendat, si habeat unde, si non, respondeat ꝑ seipso. Item dare poterit ita liberè, sicut ipse illā unquam liberiùs tenuit, unde si p ipsum aliquo tempore inde fuerit onerata vel servituti supposita, ipse eam tenetur liberare, ꝑpť modum donationis. Eodem modo si dicat, ita liberè, sicut ipse vel aliquis antecessorum suorum illā unquam liberiùs tenuit, & sic eodem modo præstet donator, q ꝑmisit. Item sicut aliqua terra vel aliqua eleemosyna liberiùs dari poterit, hoc est de omni, q ipsum tangit & feoffatorē suum, & si habet unde acquietet.

8. De servitiis, quæ nec dicuntur intrinseca, nec forinseca, sed concomitantia. Britton, l. ii. ch. viii. § 7. Fleta, 198.

Sunt etiam quædā cōsuetudines, quæ nec dicuntur intrinsecæ nec forinsecæ, sed sunt quædam servitia concomitantia, sicut servitia regalia & militaria, & etiā homagia, & ideò in chartis non sunt exprimenda, quia si homagium p̃cesserit & regale servitium, sequitur exinde, q ad capitalē dñm ꝑtinebit relevium & custodia & maritagium, sive servitium sit militare, vel serjantia ꝑpť exercitum ad plus se habuerit vel ad minus, saltem ad unum obolum. Sunt etiam quædā consuetudines, quæ servitia non dicuntur, nec cōcomitantia servitiorum, sicut sunt rationabilia auxilia ad filium primogenitū militem faciendū, vel ad filiā primogenitā

wise a person may give a tenement, which he held by military service, to be held in villenage by villein customs and services, provided they be certain and expressed. f. 36 b. But if he should say that he gives it as freely as any land may be given more freely, this will have to be understood, as far as it appertains to the donor [to do so], and he will have to make good as regards his own feoffor, as much as shall appertain to him. But if the thing given be under an obligation as well towards others as towards its chief lord, he is not bound to this by these words to acquit himself towards the others, unless he has specially taken upon himself that burden, and then he shall make good towards all, if he has wherewithal; if not, he shall answer for himself. Likewise he may give a thing as freely as he has ever held it more freely, whence if it has been burdened or subjected to a servitude by him at any time, he is bound to liberate it, on account of the mode of the gift. In the same manner if he shall say, as freely as he himself or any of his predecessors ever held it more freely, and so in the same manner the donor should furnish what he has promised. Likewise as any land or any alms may be given more freely, that is as regards everything which touches himself or his feoffor, and if he has wherewith to acquit.

8. Of services which are termed neither intrinsic nor forinsic, but concomitant.

But there are certain services, which are termed neither intrinsic nor forinsic, but are certain concomitant services, such as royal and military services, and even homages, and therefore they are not to be expressed in the charters, because if homage and a royal service have preceded, it thereupon follows that a relief and the custody and the maritage will appertain to the chief lord, whether it be a military service or a serjeanty on account of the army, whether it be for more or for less, if it be only for a halfpenny. There are also some customs, which are not called services, nor are they the concomitants of services, such as are reasonable aids to make the eldest son a knight, or to marry the eldest daughter, which aids are

maritandā, quæ quidē auxilia fiunt de gratia & non de jure, & ꝑ necessitate, & indigentia dñi capitalis. Nunquam igitur exigitur auxilium, nisi præcedat necessitas, nec tenetur aliquis ad hujusmodi auxiliū præstandū, nisi ex indigentia domini sui capitalis, et ex eo, q̄ est liber homo suus. Et sunt hujusmodi auxilia ꝑsonalia et non prædialia, ꝑsonas enim respiciunt et non feoda, secundùm q̄, ꝑpendi poterit ex præcepto dñi regis ꝑ breve suum. Est itaque præceptum suum tale, quòd vic. justè et sine dilatione, habere faciat tali rationabile auxilium suum de militib⁹ et liberè tenentibus suis in balliva sua, ad primogenitum filium suum militem faciendū, et in eadem forma fiat breve de filia sua primogenita maritanda, secundùm q̄ inferiùs dicetur. Primogenitæ filiæ non dabitur auxilium tale, quia istud auxilium pertinet ad capitalem dominum, sicut pertineret, si non esset, nisi unus hæres, cùm omnes sunt quasi unus hæres. Et cùm hujusmodi auxilia dependeant ex gratia tenentium, & non ad voluntatem dominorum, nec sunt feodalia sed personalia, haberi debet respectus ad personam utriusque, tam domini, quàm tenentis, ut domini necessitas, secundùm quod major esset vel minor, relevium acciperet, & quòd tenens gravamen non sentiret, sed quòd auxilium accipienti cederet ad commodum, & danti ad honorem. Sunt etiam inter alia quædam præstationes personales, quæ non dicuntur servitia, sed auxilia vic. quæ non tenetur feoffator warrantizare. Item sunt omnes fines communes ꝑ toto comitatu, ut in itinere justic. & alibi pro misericordiis, ut si comitatus pro transgressione in
f. 37. misericordiam inciderit, quæ quidem non sunt inter servitia connumeranda. Sunt etiā quæd cōmunes p̃stationes, quæ servitia non dicuntur, nec de consuetudine veniunt, nisi cùm necessitas intervenerit, vel cùm rex

granted of favour not of right, and by reason of the necessity and the indigence of the chief lord. An aid is therefore never exacted, unless a necessity for it precedes, nor is any one bound to furnish such an aid, except upon the indigence of his chief lord, and from the circumstance that he is his free man. And these aids are personal and not predial, for they regard the persons not the fees, according as it may be inferred from the precept of our lord the king by his writ. And his writ is in this form, that the viscount rightly and without delay shall cause so-and-so to have his reasonable aid from the knights and his free tenants in his bailliwick, to make his eldest son a knight, and in the same form a writ should run for marrying his eldest daughter, according as will be explained below. Such an aid shall not be granted to a first-born daughter, because that aid appertains to a chief lord, as it would appertain, if there was not more than one heir, since all are but as one heir. And since aids of this kind depend on the favour of the tenants, and not on the will of the lords, and are not feudal but personal, regard ought to be had to the person of each, as well of the lord as of the tenant, so that the necessity of the lord, according as it is greater or less, should receive relief, and that the tenant should not feel it a grievance, and that the aid should turn out to the advantage of the receiver and to the honour of the giver. There are likewise, amongst other things, certain personal contributions, which are not called services, but aids to the viscounts, which the feoffor is not bound to warrant. There are likewise all the common fines in behalf of the whole county, as in the iter of the justiciaries and elsewhere for amercements, as if the county for a trespass should fall under an amercement, which are not amongst common services. There are also certain f. 37.
common contributions, which are not termed services, nor are derived from custom, except when a necessity arises, or when the king comes, such as hidages,

venerit, sicut sunt hidagia, coraagia[1] & carvagia & alia plura de necessitate & ex consensu cõmni totius regni introducta, & q̃ ad dñm feodi non pertinent, & de quibus nullus tenetur tenentem suum acquietare, nisi se ad hoc specialiter obligaverit in charta sua, & unde cùm dicat feoffator & dñs capitalis, ego & hæredes mei warrantizabimus tali & hæredibus suis tantã terrã cum pertinentiis, contra oms gentes imppetuum per p̃dictum servitium, hoc erit intelligendum, tantam terrã cum pertinentiis de omnibus servitiis, & secularibus demandis, quæ ad dominos feodi pertinent ratione p̃dicta[2] tenementi. Igitur servitia, quæ pertinent ad dominum regem p̲ justitia vel pace, sicut sectæ ad cõm vel hundr̃, & tres sectæ prænominatæ ad curias, auxilia vic. & ad fines communes & misericordias, excluduntur, cùm non pertineant ad dominos feodorum, sed ad regem, nisi ipse dñs feodi ad hoc specialiter se obligaverit in charta sua. Poterit enī dominus, si voluerit, se obligare ad indebita, & teneri & debita remittere, si voluerit, uṫ si tenenti suo remittat custodiam, maritagium & relevium, cùm evenerint. Ea verò, quæ pertinent ad regem, remittere non potest, & onerare seipsum[3] in præjudicium dñi regis nec tenentem acquietare, cùm hujusmodi personas hominum requirunt, sicut visus franciplegii, & alia, quæ introducta sunt pro pace & communi utilitate. Nec etiam dñs ea remittere poterit tenenti suo, si ipse dominus hujusmodi libertates concessas habeat à dño rege, non magis quàm facere sub se justitiarios, cùm ipse in hac parte sit justitiarius domini regis, nisi ipse rex factum & concessionem domini feoffantis confirmaverit. Sed tunc

Britton, l. ii. ch. viii. § 8.
Fleta, 197, 199.

[1] "coruagia," "et" being omitted in MS. Rawl.; "et coriagia," MS. Crewe.

[2] "prædicti," MSS. Rawl. and Crewe.

[3] "obligare tamen potest et onerare se ipsum," MS. Rawl., which omits all that follows down to "Item poterit quis feoffari." "Obligare non potest et onerare seipsum," MS. Crewe, which likewise omits what follows, down to "Item poterit."

coraages, carvages, and several other things introduced from necessity and by the common consent of the whole realm, and which do not appertain to the lord of the fee, and concerning which no one is bound to acquit his tenant, unless he has specially bound himself in his charter; and hence when the feoffor and capital lord says, I and my heirs warrant to so-and-so and his heirs so much land, with its appurtenances, against all persons in perpetuity through the aforesaid service, this will have to be understood [as warranting] so much land with its appurtenances from all services and secular demands, which appertain to the lord of the fee on the account aforesaid of the tenement. Therefore services, which appertain to the lord the king for the maintenance of justice and of peace, such as suits to the county or to the hundred, and the three suits above-named, to the courts, to the aids of the viscount, and to common fines and amercements, are excluded, since they do not appertain to the lords of fees, but to the king, unless the lord of the fee himself has bound himself specially to this in his charter. For the lord of the fee, if he pleases, may bind himself to things not due and to be bound to remit things due, if he chooses, as if he should remit to his tenant the custody, maritage, and relief, when they arise. But those things, which appertain to the king, he cannot remit and charge upon himself to the prejudice of our lord the king, nor acquit his tenant, since [matters] of this kind require the presence of persons, such as the view of frankpledge and other things, which have been introduced for peace and the common interest. Nor can the lord remit them to his own tenant, if the lord himself has these liberties granted to him by our lord the king, no more than he can make justiciaries under him, since he himself is a justiciary in this part of our lord the king, unless the king himself has confirmed the act and the grant of the enfeoffing

cum ex confirmatione dñi regis factum dñi roboratur, non poterit dñs contra factum suum venire, cùm hoc non fit ad alicujus præjudicium nisi suum proprium. Nec ipse rex contra suam confirmationem. Quod quidem aliter esset, si hujusmodi libertates tantùm pertinerent ad dominum regē, & non ad alium. Unde remittere non potest, obligare tamen potest & onerare seipsum. Item poterit quis feoffari ab alio per diversa genera servitiorum facienda, s. per servitium unius denarii & reddendo scutagium, & per serjantiam unam vel plures.

9. Quod tenementum dici debet socagium, et quod militare feodum.

Et unde, si tantùm in denariis & sine scutagio vel serjantiis,[1] vel si ad duo teneatur sub disjunctione, scilicet ad certam rem dandam pro omni servitio, vel aliquam summam in denariis, id tenementum dici potest socagium. Si autem superaddat scutagium & servitium regale, licèt ad unum obolum, vel serjantiam, secundùm quod superiùs dictum est, illud dici poterit feodum militare.

10. De clausula warrantiæ.

In charta verò de donatione quandoq; adjicitur hæc clausula: Et ego & hæredes mei warrantizabimus tali & hæredibus suis tantum, vel tali & hæredibus suis & assignatis & hæredibus assignatorum, vel assignatis assignatorum & eorum hæredibus, & acquietabimus & defendemus eis totam terram illam cum pertinentiis (secundùm quod prædictum est) contra omnes gentes[2] imperpetuum, per prædictum servitium. Per hoc autem quod dicit, ego & hæredes mei, obligat se & hæredes
f. 37 b. suos ad warrantiā, ꝑpinquos & remotos, p̃sentes & futuros, ei succedentes in infinitum. Per hoc autem q̃ dicit, warrantizabim⁹, suscipit in se obligationē, ad defendend̄ suum tenentem in possessione rei datæ &

[1] "et unde, si tantum in denariis" "et sine scutagio vel serjantiis," omitted in MS. Rawl., inserted in MS. Crewe.

[2] "gentes." This is evidently the Latin translation of the Anglo-Norman "gents," *i.e.*, persons.

lord. But then, when from the confirmation of our lord the king the act of the lord is strengthened, the lord cannot contradict his own act, since it is not done to the prejudice of any one except his own. Nor can the king himself contradict his own confirmation, which would be otherwise, if franchises of this kind only appertained to our lord the king, and not to another. Hence he cannot remit, he may however bind and charge himself. Likewise a person may be enfeoffed by another for the performance of divers kinds of services, namely, for the service of one penny and the rendering of scutage, and for one serjeanty or for several.

9. What tenement ought to be called sockage, and what a military fief.

Hence therefore, if he is only [liable] in pence and without scutage or serjeanties, or is bound to two conditions disjunctively, that is to give a certain thing for every service, or a certain sum in pence, that tenement may be styled a sockage. But if he superadd scutage and a royal service, although for one halfpenny or a serjeanty, according to what has been said above, that may be called a military fief.

10. Of the clause of warranty.

In the charter, however, of donation this clause is sometimes added, "And I and my heirs, we will warrant to so and so and his heirs so much," or "to so "and so and his heirs and assigns and the heirs of his "assigns or the assigns of his assigns and their heirs," and, "we will acquit and defend for them all that land "with the appurtenances (according as has been said "above) against all persons in perpetuity through the "said service." By these words when he says, "I and "my heirs," he binds himself and his heirs, near and remote, present and future, succeeding to him in infinite time to the warranty. Likewise when he says "we "will warrant," he takes upon himself the obligation to defend in possession of the thing given his tenant and f. 37 b.

assignatos suos, & eoꝝ hæredes, & oᵐ̃s alios secundùm q̃ suprà dictum est, si fortè tenem̃ datū petatur ab aliquo in dominico. Per hoc autem q̃ dicit, acquietabimus, obligat se & hæredes suos ad acquietandꝺ, si quis plus petierit servitii vel aliud servitium, quā in charta donationis continetur. Per hoc autem q̃ dicit, defendemus, obligat se & hæredes suos ad defendendꝺ, si quis velit servitutem imponere rei datæ, contra formā suæ donationis. Itē non sufficit, si rem illā ei warrantizat, nisi warrantizaverit ejus p̃tinētias, sive consistant in corpore, sive in jure, in corpore, ut si p̃tineant Hābeletti,[1] qui non sunt de corpore rei datæ, in jure, ut si p̃maneat advocatio in p̃prio, vel servitus in alieno. Item poterit esse warrantizatio larga & stricta, larga, ut si dicatur, Ego, & hæredes mei warrantizabimꝰ tali & hæredibꝰ suis; largior, ut si dicat, tali & hæredibꝰ suis & assignatis & hæredibꝰ assignatoꝝ. Itē largissima, ut si dicat, tali & hæredibꝰ suis & assignatis, & eoꝝ hæredibꝰ & assignatis assignatoꝝ & hæredibꝰ eoꝝ, & sic tenetur donator & hæredes ejus oᵐ̃ibus warrantizare, per modū donationis, si res data ad tot manꝰ devenerit, & hoc immediatè. Si autem ita dicat, tali & hæredibꝰ suis warrantizabimꝰ, si talis ulteriùs dederit vel assignaverit, non tenetur ipse principalis feoffator talibꝰ warrantizare immediate, sed p̃ medium, s. q̃ quilibet vocet ad warrantū suum feoffatorē, de gradu in gradꝺ ascendendo. Itē poterit esse warrantia stricta, ut si dicatur, tali & hæredibus suis, quos de uxore sua sibi desponsata, p̃creatos habuerit, hîc vero coarctatur warrantizatio, ad hæredes tantū expressos & p̃non ad alios. Itē strictior, ut si dicat, ego & hæredes

[1] "Hambeletti," so written in MS. Rawl.; "hameleta," MS. Crewe.

his assigns and their heirs and all other persons according to what is said above, if by chance the tenement given by him is claimed by any one in the demesne. But by these words, when he says "we will acquit," he obliges himself and his heirs to acquit, if any one claims more service, or another service from that, which is mentioned in the charter of donation. Likewise by these words, when he says "we will defend," he binds himself and his heirs to defend, if any one wishes to impose upon the thing given a service contrary to the form of donation. Likewise, it is not sufficient, if he warrants that thing to him, unless he warrants the appurtenances, whether they consist in a corporeal thing or in a right, in a corporeal thing if hamlets, which are not of the body of the thing given, appertain to it, in a right, as if the advowson remains in one's own [estate] or a servitude in another's. Likewise, the warranty may be large and narrow, large [for instance] if it be said, "I "and my heirs will warrant to so and so and his heirs;" more large, as if he says "to so and so and his heirs "and assigns, and the heirs of his assigns." Likewise most large, as if he says to so and so and his heirs and assigns, and their heirs, and the assigns of their assigns and their heirs, and so the donor and his heirs are bound to warrant it to all persons from the mode of the donation, if the thing given has devolved to so many hands, and this immediately. But if he says thus, "we will "warrant to so and so and his heirs, if so and so has further given and assigned it, the principal feoffor himself is not to warrant it to such persons immediately, but through an intermediate person, namely, that each person must call to warranty his feoffor, from step to step ascending. Likewise the warranty may be narrow, as if it be said, "to so and so and his heirs, whom he "has begotten of his wife espoused to him," but here indeed the warranty is confined to the heirs only [as] expressed, and not to others. Likewise still more

mei warrantizabimus tibi, quo casu excluduntur à warrantia hæredes donatorii. Itē strictissima, ut si dicat ego warrantizabo vobis, nulla facta mentione de hæredibus donatoris, vel donatorii.

11. Quod, non obstante homagio, potest quis excusari a warrantia per clausulam appositam in charta, ne teneatur warranto.

Itē, quāvis in donatione interveniat homagium & servitium p̄ mod̄ in donatione appositū, excusari poterit à warrantia, si hoc adjiciat in charta donationis, ne ipse nec hæredes sui teneātur ad warrantiam, &c., quia in multis casibus vincit conventio legem. Cùm autem donator teneatur ad warrātiā, & feoffatū suum in seysina sua defēdere voluerit, & petens cōtra eū obtinuerit, tenetur donator ad excābiū ad valentiā. Et qui teneantur warrantizare, & cui, & quando, & quādo non, dicetur pleniùs infrà in tractatu de warrantia, q̄ quidē esset lōgum hîc enarrare & difficile. Itē dicitur in charta, contra oms̄ gentes, ad q̄ scienđ, q̄ poterit unus vel plures à tali generalitate extrà capi, ut si dicatur, warrantizabim⁹ contra omnes gentes, præterquam contra tales. Item videndum, cùm dicat ita generaliter contra omnes gentes, an ipse & hæredes sui warrantizare debeant contra seipsos, & sciendum q̄ sub hac generalitate non comprehenduntur, quia si terram petant in dominico contra donationem & chartam suam, eliditur actio p̄ exceptionē donationis, cū illi petere nō possūt, qui cōtra alios deberent warrantizare. Eodem modo si servitium petant indebitum, defendentur feoffati per chartam suam, vel dabitur eis actio ne
f. 38. indebitas exigant cōsuetudines & servitia, nec stare poterit simul, q̄ quis petat, ubi defendere deberet, nec

narrow, as if he shall say, "I and my heirs we will war-
" rant to you," in which case the heirs of the donatory are excluded from the warranty. Likewise most narrow, as if he should say, "I will warrant to you," no mention being made of the heirs of the donor, or of the donatory.

11. That, notwithstanding homage, a person may be excused from a warranty by a clause added to the charter, that he be not bound to warrant.

Likewise, although in the donation there intervenes homage and a service through a mode added in the donation, he may be excused from a warranty, if he adds this in the charter of donation, "that he and his heirs
" should not be bound to a warranty, &c.," because in many cases a covenant controls the law. But when the donor is bound to a warranty, and has been willing to defend his feoffee in his seysine, and the claimant has prevailed against him, the donor is bound to make compensation to the [full] value. And who is bound to warrant, and to whom, and when, and when not, shall be explained below in the treatise "on warranty," which it would be long and difficult to explain here. Likewise it is said in the charter "against all persons," in regard to which it is to be known that one or more persons may be excepted from such a generality, as if it be said, "we will warrant against all persons except
" against so and so." Likewise it is to be seen, when he says so generally "against all persons," whether he himself and his heirs ought to warrant against themselves, and it is to be known that they are not comprehended under this generality, because if they should claim the land in the domain against the donation and their own charter, the action is evaded by the exception of the donation, since those persons cannot claim, who ought to warrant against others. In the same manner if they claim a service, which is not due, the feoffees will be defended by their own charter, or they will be allowed an action against exacting undue customs and services, f. 38. nor would it be consistent, that a person should claim, when he ought to defend, nor, if the feoffor should

si feoffator petat versus feoffat̃ suū, nunquā locū habebit placitū de warrātia chartæ. Itē dicitur, ꝑ p̃dictū servitium, i. ꝑ servitium in charta donationis cōp̃hensum, quia si nullum esset in charta donationis exp̃ssum, superflua esset adjectio, s. ꝑ p̃dict' servitiū, & unde videtur, q̄ om̃ia servitia & cōsuetudines exprimi debent in charta donationis, q̃ ꝑtinent ad dn̄m capitalem ꝑ feoffatorē ex teñto dato, & q̄ nihil aliud peti possit, nisi q̄ in charta donationis exp̃ssum fuerit. Videtur etiā, ꝑ hæc verba, q̄ donator ad warrātiā tenebitur, quāvis homagiū nō intervenerit nec fidelitas.

12. De appositione signi, et de testibus. Britton, l. ii. ch. viii. § 13. Fleta, 199.

Et quoniā hujusmodi scripturæ nō esset fides adhibēda, nisi sign̄ intervenerit, q̄ talis donatio & scriptura à conscientia & voluntate donatoris emanaret, ideò in testimonium & approbationē rei gestæ, apponit donator sign̄, adjiciendo in charta donationis clausulā istā, q̄ ut ratum sit & firmū, &c. Vel sic, in cuj° rei testimoniū huic scripto sigillū meum apposui. Debent etiam testes ad hoc vocari, ut sub p̃sentia eor̃ om̃a cum solēnitate ꝓcedāt, ut veritatē dicere possint, si inde fuerint requisiti, & eor̃ nomina debent in charta cōp̃hendi, & si in cōfectione chartæ p̃sentes non fuerint, sufficit si postmod̄ in p̃sentia donatoris & donatorii fuerit recitata & concessa; & utilius & melius, si in locis publicis, sicut in com̃ & hundred', ut facili° ꝓbari possit, si fortè fuerit dedicta, & cùm talis fuerit solēnitas adhibita, nō multū refert, utr̃ ꝓprio vel alieno sigillo sit signata, cùm semel à donatore coram testibus, ad hoc vocatis, recognita & concessa fuerit. Si

claim against his feoffee, the plea of warranty of charter will never hold its place. Likewise it is said "by the "aforesaid service," that is by the service expressed in the charter of donation, for if none should be expressed in the charter of donation, the addition, that is "by the "aforesaid service," would be superfluous; and hence it appears that all the services and customs ought to be expressed in the charter of donation, which appertain to the chief lord, by the feoffor, from the tenement given by him, and that nothing else can be claimed, except what has been expressed in the charter of donation. It appears also by these words, that the donor shall be bound to the warranty, although neither homage nor fealty has intervened.

12. Of the affixing of a signature, and of witnesses.

And since faith is not to be given to a writing of this kind, unless a signature intervenes [to show] that such a donation and writing have emanated from the conscience and intention of the testator, therefore in testimony and approval of the transaction the donor affixes a signature, adding in the charter of donation this clause, "which "that it may be ratified and firm, &c."; or thus, "in "testimony of which thing I have affixed my seal to "this writing." Witnesses also ought to be called, that in their presence all things may proceed with solemnity, so that they may be able to tell the truth, if they should be required for that purpose, and their names ought to be inserted in the charter, and if they have not been present at the making of the charter, it is sufficient, if it be read over and granted afterwards in the presence of the donor and of the donatory, and it is more advantageous and better if it be done in a public place, as in the county or the hundred, that it may be the more easily proved, if by chance it should be gainsaid, and when such a solemnity has been adopted, it matters not much whether it be sealed with one's own or another's seal, when once it has been recognised and granted by the donor in the presence of witnesses summoned for that

autem testes p̃sentes non fuerint, nec talis solemnitas adhibita, si de signo & charta oriatur dubitatio, si cùm testes fuerint requisiti, dicant se nil inde scire, ita deficere possit charta, quāvis vera sit & bona, ꝑpter defectū ꝓbationis, deficere enī poterit ꝓbatio, quāvis non deficiat charta. Si autem dubitaverint de charta, donationē non ꝓbant, quia quotiescunq; dubitatur an quid sit, perinde est, ac si non esset illud. Si autē dicūt, secundꝺ credulitatē suā, non tamē ꝓbant, sed p̃sumptionē inducunt, cui standꝺ erit, donec ꝓbetur in contrarium. Si autem dicat unꝰ eoꝝ se p̃sentem fuisse, nec hoc sufficit ad plenam ꝓbationem, sed semiplenā, quia similiter inducit p̃sumptionem. Si autē duo dicant se interfuisse, sufficit ad plenā ꝓbationem, licèt alii dicant se nil inde scire; cū duobꝰ non contradicant expressè, & cū in ore duoꝝ vel triū testiū stet oñe verbū. Si autē testes contrarii fuerint in suis testimoniis, & quidā illoꝝ dicāt contra chartā & donationē, & quidā ꝑ charta, & fuerint īpares numero, majori & digniori parti standꝺ erit; si autem pares in numero & dignitate, erit pro charta & donatione judicandꝺ, ut donatio magis valeat quā pereat. Item si dicant testes, q̃ interfuerint, ubi p̃locutio donationis facta fuerit, vel confectioni & recitationi notulæ, nec hoc sufficit, quia adhuc possunt partes resilire. Item non sufficit chartam esse factā & signatā, nisi ꝓbetur donationem esse perfectam, & quòd omnia, quæ donationem faciunt, ritè præcesserunt, & subsequutam esse traditionem, alioqui nunquam transferri potest res donata ad donatorium. Poterit enim homagium præcessisse, & quòd charta ritè facta sit, & vera & bona, & cum solemnitate recitata

Britton, l. ii. ch. viii. § 11.
Fleta, 200.

purpose. But if witnesses have not been present, and no such solemnity has been adopted, if a doubt arises about the signature and the charter, if, when the witnesses are required, they should say that they know nothing thereabouts, the charter may thus fail, although it be true and good, from default of proof, for the proof may fail, although the charter is not defective. But if they have doubt about the charter, they do not prove the donation, for as often as it is doubted, whether a thing exists, it is the same as if it did not exist. And if they say according to their belief, they do not prove, but they induce a presumption, which should prevail until the contrary is proved. But if one of them says, that he was present, this is not sufficient for full proof, but for half proof, for it induces in like manner a presumption. But if two say, that they were present, it suffices for full proof, although others say that they know nothing thereabouts, since they do not contradict expressly, and since every word rests on the mouth of two or three witnesses. But if the witnesses are contradictory in their evidence, and some of them speak against the charter and the donation, and some for it, and they are unequal in number, the greater and more worthy part shall prevail; but if they are equal in number and in worth, judgment shall be for the charter and the donation, that the donation shall prevail rather than fail. Likewise, if witnesses say that they were present when the public reading of the donation was made, or at the making and reading of the note, this is not sufficient, for the parties might still resile. Likewise it is not sufficient, that a charter has been made and signed, unless it be proved that the donation has been completed, and that all things which constitute a donation have duly preceded and delivery has followed, otherwise the thing given can never be transferred to the donatory. For homage may have preceded, and the charter may have been duly made and be true and good,

& audita, tamē nunquā valebit donatio, nisi tunc demū, cum fuerit traditio subsequuta, & sic poterit charta esse vera, sed sine facta seysina, nuda. Itē aliquādo, vice versa, poterit donatio esse vera & pfecta, & charta falsa, ut si quis, cū donationem fecerit & seysinā donatorio & hora congrua & sine charta, obierit, vel mente alienat⁹ fuerit, & donatori⁹ post hæc chartā donationis acquisierit, licèt signū cognitum fuerit, nihilomin⁹ tenebit donatio, & charta nulla erit. De hac materia pleni⁹ dicetur infrà, de fide chartaꝝ & instrumentoꝝ, si eis fuerit in judicio contradictum.

Cap. XVII.

1. De possessione, et quod non valet donatio, nisi subsequatur traditio, et ideo videndum de divisione possessionum, et qualiter acquiratur possessio rerum. Cod. II. iii. 20. Britton, l. ii. ch. ix. § 1. Fleta, 200.

Donationū, secundꝺ q̄ p̄dictū est, alia p̱fecta, alia imperfecta, sed cū dare sit rē accipientis facere, nūq̄ erit perfecta donatio, antequā donatori⁹ plenā habuerit possessionem, sive seysinā, & p̱ se sive p̱ aliū, qui jus clamaverit in re, & donec sibi tradita res fuerit, quia traditionib⁹ & usu captionib⁹ possessiones & reꝝ dominia trāsferuntur. Non enī sufficit si jus alienū alicui cōcedatur, nisi donatorius seysinā habuerit vel fuerit consequutus & adeptus. Sed quoniā possessio sive seysina multiplex est; inprimis vidēꝺ erit quid sit possessio, & qualiter dividatur. Itē qualiter acquiritur p̱ traditionē, vel alio ¦modo, & per quas p̱sonas acquiritur, & qualiter, cū acquisita fuerit, retineatur, & qualiter quis uti debeat, & si plurib⁹ fiat, quis p̄fe-

and have been read over and heard with solemnity, nevertheless it will never be valid, except at that last moment when delivery has followed, and so the charter may be true, but without the fact of seysine, it is nude. Likewise sometimes, on the converse, the donation may be true and perfect and the charter false, as if any one, when he has made a donation and [given] seysine to the donatory and at a suitable hour, and without a charter, shall have died, or gone out of his mind, and the donatory afterwards has acquired a charter of gift, although the signature be known, nevertheless the donation will hold good, and the charter will be null. More will be said on this matter below, [in treating] of the credit of charters and of instruments, if they are contradicted in a court.

Chapter XVII.

1. Of possession, and that a donation is not valid, unless delivery follows, and therefore we must speak of the division of possessions, and in what manner the possession of things is acquired.

Of donations, according to what has been said above, some are perfect, others imperfect, but since to give is to make a thing [the property] of the acceptor, the donation will never be perfected, before the donatory has had full possession or seysine either by himself or by another, who has claimed a right in the thing, and until the thing has been delivered to him, because possessions and the dominion over things are transferred by delivery and usucaption. For it is not sufficient, if another's right has been granted to any one, unless the donatory has had seysine, or has acquired it and obtained it. But since possession or seysine is of many kinds, we must ascertain in the first place what possession is, and in what ways it is divided. Likewise in what ways it is acquired by delivery, or in any other manner, and through what persons it is acquired, and in what ways, when it has been acquired, it is retained, and in what ways a person ought to use it, and if that may be done in several ways, which way is preferred, and when it has

ratur, & cum acquisita fuerit, qualiter amittatur, & cū amissa fuerit, qualiter restituatur. Ideò dicitur, quis est in possessione vel quasi.

2. Quid sit possessio. Dig. XLI. i. § 43, 1.

Quid sit possessio, videndū. Et sciendum, q̄ possessio est corporalis rei detentio, i. corporis & animi cū juris adminiculo cōcurrente. De re autē corporali ideò dicitur, quia incorporalia nō possūt possideri nec usucapi, nec sine corpore tradi, quia p̄ se traditionem non patiuntur; ideò dicuntur quasi possideri, tradi enī possunt, vel quasi, p̄ patientiā & per usum. Et possessio ideò dicitur rei detentio, quia naturaliter tenetur ab eo qui ei insistit, i. corporaliter. De hoc autem q̄ dicitur, corporis & animi cum juris adminiculo concurrente, dicetur infrà pleniùs, & cùm quis in possessione fuerit & ei controversiā moveamus, aut pertinet ad hoc, ut nostrum petamus q̄ non possidemus, & fortè injustè fuerimus ejecti de possessione propria, vel si alienam possessionem, sicut antecessoꝝ nostrorum petierimus q̄ nobis restituatur, vel ad hoc, quòd per interdictum, nobis retinere liceat liberè & quietè, benè & pacificè possidemus. Restituendæ enim possessionis ordo per actionem expeditur. Retinendæ vero duplex est, aut exceptio aut interdictum. Exceptio vero datur multis de causis.

3. Qualiter dividitur possessio. Dig. XLI. v. § 2.

Dividitur autem possessio sic, possessionum autem alia civilis, alia naturalis. Civilis autem est, quæ animo tantùm retinetur. Naturalis, quæ corpore, &

been acquired, how it may be lost, and when it has been lost, how it may be re-established. Therefore it is said, who is in possession, or as it were in possession.

2. What is possession.

We must consider what is possession. And it is to be known that possession is the detention of a corporeal thing, that is [a detention on the part] of the body and of the mind with a concurrent support of right. But we speak of a corporeal thing on this account, because incorporeal things cannot be possessed or be subjects of usucaption, nor can be delivered without a person, because by themselves they cannot undergo delivery. They are therefore said to be as it were possessed, for they may be delivered, or as it were [delivered] by patience and by use. And possession on this account is said to be the detention of a thing, for it is naturally held by him, who stands upon it, that is, corporeally. But respecting that which is termed [a detention on the part] of the mind and of the body with a concurrent support of right, we shall treat that more fully below. And when a person is in possession, and we raise a controversy with him, it is either pertinent to this, that we claim as our own that, which we do not possess, and perhaps we have been unjustly ejected from our own possession, or if [we claim] another's possession, [we claim it as the possession] of our ancestors, that it may be restored to us, or for this object that we may be allowed by an injunction to retain freely and quietly, what we possess effectively and peacefully. For the order of restoring possession is expedited by an action, but [the order] of retaining possession is twofold, either an exception or an injunction. But an exception is allowed for many causes.

3. In what ways possession is divided.

But possession is divided thus: some possession is civil, and another possession is natural. That indeed is civil, which is only retained in intention. Natural [possession] is corporeal, and sometimes it is rightful, and

aliquando justa est & aliquando injusta. Et potest quis utroque modo possidere, scilicet animo & corpore, ita quòd neque animo per se, neq; corpore per se, & acquirere nemo potest possessionem nisi utroque modo, animo & corpore, & sicut non potest possessio nisi
f. 39. animo & corpore acquiri, sic non potest nisi utroq; amitti, & cū utroq; acquiratur, licèt corpore poterit amitti, animo solo poterit retineri. Itē possessionum, alia justa, alia injusta, secundꝺ q̄ inferiùs videri poterit in tractatu de assisa novæ disseysinæ. Item alia vera, alia imaginaria, sive colorata sive fictitia. Imaginaria verò, ubi quis se gesserit ac si possideret, cùm aliꝰ possideat. Itē alia nuda, alia vestita. Nuda, ubi quis nil juris habet in re, nec aliquā juris scintillam, sed tantùm nudā peꝺ positionem; vestita, jure, titulo, vel tēpore. Itē quædā bona & firma, quædam adepta, & quædam adipiscenda, & quædam nuda & infirma. Item quædam ꝑpria, quædā aliena, & alienaꝛ̄, quædā ꝑpinqua & quædā remota. Item quædā vetus, & quædā recens & nova. Itē est quædam, quæ nihil juris habet in re, sed aliquid possessionis, ut si quis fuerit in seysina vel possessione per intrusionem. Est etiā alia possessio, quæ aliquid habet possessionis, sed nihil juris, ut si quis fuerit in possessione ut custos, vel creditor & hujusmodi. Est & alia possessio, quæ multū habet possessionis, & paꝛ̄ juris, sicut est possessio antecessoris in causa possessionis, de qua quis moritur seysitus, ubi alius habet jus meꝛ̄, & antecessor feodum & libeꝛ̄ tenementum. Est & alia possessio, quæ plurimū habet possessionis & aliquid juris, ubi convertitur causa

sometimes wrongful. And a person may possess in both ways, that is mentally and corporeally, in such a manner as neither mentally by itself nor corporeally by itself, and no one can acquire possession except in both ways, mentally and corporeally, and as possession cannot be acquired except mentally and corporeally, so it cannot f. 39.
be lost except in both ways, and since it is acquired in both ways, although it may be lost by the body, it may be retained by the mind alone. Likewise of possessions, some are rightful, and others are wrongful, according to what may be seen below in the treatise, "On the Assise "of Novel Disseysine." Likewise some are true, others imaginary, or colourable, or fictitious. Imaginary indeed, when a person conducts himself in such a manner as if he possessed [a thing], when another possesses it. Likewise some are bare, others clothed. Bare, when a person has no right in the thing, nor any spark of right, but only the bare position of his feet [on it]: clothed, either with right, or title, or time. Likewise some are good and firm; some have been attained and some are to be attained, and some are bare and infirm. Likewise some are one's own, some are those of other persons, and of those of other persons some are near and some are remote. Likewise some are ancient, and some are recent and new. Likewise there is some possession, which has no right in the thing, but a certain possession, as if a person is in seysine or possession by intrusion. There is likewise another possession, which has something of possession but nothing of right, as if a person shall be in possession as a keeper, or a creditor, or such like. There is likewise another possession, which has a great deal of possession but little right, as in the possession of an ancestor in a cause of possession, of which a person dies seysed, where another has the absolute right, and the ancestor the fee and free tenement. There is another possession, which has very much possession, and some right, where the cause of the ownership is converted,

ꝑprietatis, ut si quis tenuerit ad terminū vitæ vel annoꝝ ꝑ concessionem alicujus, qui illam sic dimisit in vita sua, & non obiit inde seysitus. Est & alia possessio, quæ multum habet possessionis, & multum juris, sicut illa, ubi quis habet in re aliqua jus merum, & ꝑprietatem feodi, & liberꝝ tenementum cum seysina, sed de qua non obiit seysitus. Item possessionum, quædā brevis est & tenera, & quædā longa & tempore firmata, ut si quis ꝑ intrusionem vel disseysinam in seysina fuerit, vel ab eo, qui nihil juris habuerit, vel si aliquid habuerit, in p̃judiciū veri domini feoffaverit, qui meꝝ jus habuit & ꝑprietatem, vel cōtra cōvētionem vel modum donationis, & hujusmodi, ubicunq; vertitur in alterius p̃judiciū, talis possessio semꝑ erit tenera, donec ex tēpore (q̃ pro titulo sufficiat) fuerit firmata, ꝑ negligentiā veri domini, vel ꝑ impotentiam. Si autem facta fuerit donatio ab aliquo, qui jus habet & ꝑprietatem, feodum & liberꝝ teñtum & seysinā, cùm donatori[9] animo retinendi ingress[9] fuerit, & donator à possessione recesserit cùm familia sine animo vel spe revertendi, statim & sine mora erit donatio firma, & acquiritur liberum tenementum accipienti, ex quo concurrunt sine alicujus præjudicio, jus & seysina. Item possessionum, alia pacifica, alia contentiosa, & poterit contentio esse injuriosa vel justa, secund quod possessio fuerit justa vel injusta. Item possessionum, alia continua & longa, alia interrupta vel brevis, ut si malæ fidei possessor, sicut intrusor vel disseysitor, in longa & pacifica extiterit possessione, liberum tenementum acquirit ex tempore, ita si verus domin[9] statim & recenter impetraverit, vel nitatur eos ejicere, licèt non

Britton, l. ii. ch. xi. § 3.

as if a person be a tenant for the term of his life or [for a term] of years by the grant of any one, who has so demised it during his lifetime, and has not died in seysine of it. There is likewise another possession, which has a great deal of possession and a great deal of right, like that where a person has in any thing the absolute right and the property in the fee, and the free tenement with seysine, but of which he had not the seysine, when he died. Likewise of possessions, some are short and tender, and others are long and strengthened by time, as if a person be in seysine by intrusion, or by disseysine, or by [the act of] him who had no right, or if he had any, has enfeoffed him to the prejudice of the true lord, who had the absolute right and property, or against an agreement or the mode of the donation, and such like, whenever it is turned to the prejudice of any one, such a possession will always be tender, until it has been strengthened by time, which may suffice for a title through the negligence of the true lord or his want of power. But if the donation has been made by some one, who has the right and the property, the fee and the free tenement and the seysine, when the donatory has entered upon it with the intention of retaining it, and the donor has withdrawn from the possession of it with his family, without the intention or hope of returning to it, the donation will be firm forthwith and without any delay, and the freehold is acquired by the acceptor, as soon as the right and the seysine concur without prejudice to any one. Likewise of possessions, some are peaceable, others are contentious, and the contention may be wrongful or rightful, according as the possession be rightful or wrongful. Likewise of possessions, some are continuous and long, others interrupted or short, as if a possessor in bad faith, such as an intruder or a disseysor, has been in long and peaceable possession, he acquires a freehold from time, so that if the true lord shall have immediately and soon afterwards made claim, or shall attempt to eject them, although he cannot [do

possit, talis possessio dicitur interrupta, & ita q̃ si post longum temp^{o} ejecerit, incontinenti dicitur ejecisse, dum tamen continua sit vis & invasio. Item possessionum, alia justa civiliter & naturaliter, quantum ad quasdā personas, quantum ad alias injusta utroq; modo, scilicet quantum ad verum dominum poterit esse tenera,
f. 39 b. quātū ad alios qui jus nō habēt, firma & bona, ut si quis aliū feoffaverit de re aliena, ut suprà tactū est (si fiat donatio de re aliena) talis poterit esse tenera. Itē est quæd̃ possessio p̃caria, ut si quis cōcesserit alicui habitationem, vel usum fructuū in re sua ad voluntatē suā, quæ satis dicitur nuda, eo q̃ tēpestivè & intempestivè poterit revocare, & si talis cōtra volūtatē veri domini seysinā retinere contenderit, statim ejiciatur, & si ejici non possit, ejiciatur p̃ assisam. Itē est possessio concessa p̃ p̃cio, & tunc refert utrum certum sit p̃cium constitutum vel incertum. Si autem certum precium, ad certum temp^{o} vel imperpetuum, ejici non poterit p̃ voluntate concedentis, si autem incertum, tunc fiat ut suprà dicitur de precario.

Cap. XVIII.

1. De traditionibus. Itē nō valet donatio, nisi subsequatur traditio, quia nō transfertur p̃ homagiū res data, nec p̃ chartaī vel instrumētoī cōfectionē quāvis in publico fuerint recitata. Itē neq; p̃ imaginariā traditionē, ubi corpore recedit & animo retinet possessionē, & vult poti^{o} q̃ res data cū eo remaneat, quàm trāseat ad donatoriū, & unū

so], such a possession is said to be interrupted, and so that, if after a long time he has ejected them, he is said to have ejected them forthwith, provided always that the force and invasion be continuous. Likewise of possessions, some are rightful civilly and naturally, as regards certain persons, and wrongful in both ways as regards others, that is as regards certain persons they may be tender, and as regards others, who have no right, f. 39 b. [they may be] strong and valid, as if a person has enfeoffed another in another person's estate, as has been alluded to above, (if a donation be made of another person's property), such [a possession] may be tender. Likewise some possession is precarious, as if a person has granted to another a habitation or the enjoyment of fruits in his own property according to his own pleasure, which is sufficiently styled "bare," because he can revoke it in season or out of season, and if such a person strives to retain seysine against the will of the true lord, he may be ejected at once, or if he cannot be ejected [by force], he may be ejected by an assise. Likewise possession is granted for a price, and then it is of importance whether the price be settled or uncertain. But if the price be certain for a certain time or in perpetuity, he cannot be ejected at the will of the grantor, but if the price be uncertain, then it may he done as aforesaid, when the possession is precarious.

Chapter XVIII.

Likewise a donation is not valid, unless delivery follow, for a thing given is not transferred by homage nor by the making of charters or of deeds, although they are read aloud in public. Likewise neither by an imaginary delivery, where he withdraws corporeally, but mentally retains possession and intends that the thing given should rather remain with him, than pass to the donatory, and he does one thing and pretends to do

1. Of deliveries.

agit & alteř agere simulat, sed tunc demū cū donator plenā fecerit seysinā donatorio ꝑ se, si p̃sens fuerit, vel ꝑ ꝓcuratorē, & literas, si absens fuerit, ita q̄ charta donationis & literæ ꝓcuratoriæ corā vicinis, ad hoc specialiter cōvocatis, legātur in publico, & etiā cū donator corpore & animo recesserit à possessione, si absēs fuerit in ipsa traditione, sine aliqua spe & animo revertēdi, ut dñs, & cū donatori[9] in possessione vacua extiterit corpore et animo, & cū volūtate retinēdi possessionē, & q̄ un[9] desinat & ali[9] incipiat possidere, quia donator nūquā desinit possidere, donec donatori[9] plenariè fuerit in seysina, nec jacebit seysina, aliquo tēpore medio, vacua.

Britton, l. ii. ch. ix. § 2. Fleta, 201.

2. Quid sit traditio. Azo ad Inst. II. p. 1070.

Azo in Cod. l. iv. p. 426.

Vidēđ est primò, quid sit traditio, & est traditio, de re corporali ꝓpria vel aliena, de ꝓsona in ꝓsonā, de manu ꝓpria vel aliena, sicut ꝓcuratoria, dū tamē de volūtate dñi, in alteri[9] manū gratuita trāslatio. Et nihil aliud est traditio in uno sensu, nisi in possessionē inductio de re corporali, ideò dicitur, q̄ res incorporalis nō patitur traditionē, sicut ipsū jus, q̄ rei sive corpori inhæret, & quia nō possūt res incorporales possideri, sed quasi, ideò traditionē nō patiūtur, sed quasi, nec adquirūtur nec retinentur nisi ꝑ patientiā & usū. De re ꝓpria vel aliena ideò dicit, q̄ refert, quis traditionē facere possit, & sciend, q̄ om̃s qui donationē, &c., sive sit dñs sive non dñs. Si autē fiat traditio à vero dño, statim & sine mora incipit donatorius habere libeř tenementum, propter conjunctionem juris & seysinæ, &

another, but then at length, when the donor shall have made a full seysine to the donatory by himself, if he be present, or by a proxy and by a letter of proxy, if he be absent, so that the charter of donation and the letters of proxy be read in public before the neighbours convoked specially for this purpose, and also when the donor has withdrawn both mentally and corporeally from the possession, if he be absent at the delivery itself, without any hope or intention of returning, as lord, and when the donatory has been placed in the vacant possession both corporeally and mentally, and with the will to retain posssession, and when one ceases and the other begins to possess, because the donor never ceases to possess, until the donatory is completely in seysine, nor will the seysine ever lie vacant at any intermediate time.

2. In what way delivery is made, and what is sufficient for delivery.

Let us see in the first place what is delivery, and delivery is "the gratuitous transfer into the hand of "another person of a corporeal thing, one's own or an- "other's, from person to person, from one's own hand or "from another's, as from the hand of a proxy, provided, "however, it be with the will of the lord." And delivery is in another sense nothing else than induction into the possession of a corporeal thing, and it is so styled, because an incorporeal thing does not admit of delivery, such as the right itself, which is inherent in a thing or in a body, and because incorporeal things cannot be possessed [in fact], but only as it were so, therefore they do not admit of delivery, but only as it were so, nor are they acquired nor retained except by patience and by use. "Of one's own or anothers," he says on this account, because it is of importance who can make a delivery, and it is to be known, that every person who [makes] a donation, &c., whether he be the lord or not the lord. But if the delivery is made by the true lord, the donatory begins immediately and without delay to have a freehold, on account of the conjunction of right

mutuum utriusq; partis consensum, & sufficit semel voluisse in ipsa traditione, vel post traditionem, & quia
Dig. XLI. i. § 9, 3. res, quæ traditione nostra fuerint, jure gentiū nobis acquiruntur. Nihil enim tā cōveniens est naturali æquitati quā desiderium dñi, volentis in aliū rem suā
f. 40. transferre, ratū habere. Et nihil interest, an ipse dñs p se tradat alicui rem suā datā, an ali⁹ voluntate ipsius, sicut p ꝑcuratorē, si ipse p̄sens nō fuerit, vel p nuntium, cum literis tamē ꝑcuratoriis patētib⁹, ut supradict' est in parte, cōtinentib⁹ voluntatē ipsi⁹ dona-
Dig. XLI. 2, §§ 1, 20. toris. Et in quo casu ostēdātur literæ & charta, ut dici poterit, talis habuit & breve & chartā, secundꝫ q Anglicè dicitur, "he had both writ and charter." Et sive fiat traditio per ipsum dñm vel per ꝑcuratorē, & si cui fieri debeat traditio de aliqua domo per se, vel mesuagio ratione alicujus fundi, eo animo ut donatori⁹ totum fundum possideat, usq; ad certos terminos, cum omnib⁹ jurib⁹ & pertinentiis suis, & ubi nō est necesse oñs glebas circumire, nec ubiq; nec undiq; pedē ponere,
Britton, l. ii. ch. ix. § 6. fieri debet traditio per ostium & per haspam vel annulum,[1] & sic erit in possessione de toto, ex voluntate & aspectu & possidendi affectu. Si autem nullum sit ibi ædificium, fiat ei seysina, secundùm q vulgariter dicitur, per fustī & per baculum,[2] & sufficit sola pedis positio cū possidendi affectu, ex voluntate donatoris, quāvis statim expletia nō ceperit; poterit enim quis habere liberum tenemtum ex traditione, quamvis statim non utatur, nec expletia capiantur, quia usus & expletia non multum operātur ad donationē, valent tamen multotiens ad possessionis declarationem, & dici

[1] "par le haspe ou par le anel "del huis, ou par enclosture de la "porte," Britton, l. ii. ch. ix. § 6.

[2] "par une verge ou par un "gaunt," Britton, *ib.*

and of seysine and the mutual consent of either party, and it is sufficient to have once had the intention in the delivery itself, or after the delivery, and because things, which are ours by delivery, are acquired by us by the law of nations. For nothing is so agreeable to natural equity as that the desire of the lord, who is willing to transfer his property to another, should be ratified. And it matters nothing, whether the lord by himself delivers f. 40. to any one the thing which he has given to him, or another [has done so] by his desire, as by a proxy, if he be himself not present, or by a messenger with letters patent however of proxy, as is above said in part, containing the will of the donor himself. And in which case let the letters and charter be shown, that it may be said that so and so had both the writ and the charter, according to the saying in English, "he had both writ and "charter." And whether the delivery be made by the lord himself or by his proxy, and if a delivery ought to be made to any one of any house by itself, or of a messuage by reason of any estate, with the intention that the donatory should possess the whole estate for certain terms with all its rights and appurtenances, and where it is not necessary to go round all the glebes nor to put his foot everywhere and on every side, the delivery ought to be made by the door [of the tenement] and by the hasp or the ring, and so he will be in possession of the whole according to the will and the aspect and the intention to possess. But if there be nowhere a house, let him have seysine given to him according to the vulgar saying, by "the staff and by the stick," and the placing of his foot [upon it] alone is sufficient with the intention to possess in accordance with the will of the donor, although he has not immediately taken any profits; for a person may have a free tenement from delivery, although he does not immediately use it nor are profits taken, for use and profits do not operate much to prove a donation; they are of value, however, on many occasions for the declaration of possession, and may be called the

potet vestimenta donationum, sicut traditio. Si quis enim equum emerit, in ipsa traditione suus erit, licèt eo statim nō utatur, & illud idē dici poterit de vestim̃ & hujusmodi. Eodē modo si quis fundū emerit, nō poterit statī arare nec excolere, quia boves fortè nō habet, nec carucā nec aliq̄ quo uti possit, vel quia dies feriat^{9}, & sufficit talis seysina, quoad libet̃ teñtum. Itē nec expletia capere possit, quia nōd̄ venit temp^{9} messuum, nec vindemiat̃. Si autē fruct^{9} nō maturos perceperit, vel arbores p̄straverit, ista nō debent dici expletia, cùm sint potius ad dānum quàm ad cōmodum. Idem dici poterit de pastu pecor̃, quia sufficit quoad seysinā, q̄ quis habeat aspectū & possidendi affectum, quāvis statim pecora non īmittat & secundùm numerum debitum. Item si traditio nō interveniat, sufficit p̄ traditione, quoad seysinā & libet̃ tenem̃, longa seysina & pacifica & lōgus usus quāvis in re aliena, ut si quis ingressum habuerit in rem vacuā & à nullo possessā, sicut in hæreditatem nō aditā, longa enī possessio sufficit pro traditione, & parit jus. Item cū p̃cesserit donatio, & donatorius, p̄pria authoritate, sine donatore vel ej^{9} p̄curatore, vel sine brevi & nuntio se posuerit in seysinā sine traditione, non valet talis seysina. Potest enī donator ante traditionem mutare voluntatem, cùm imperfecta sit donatio, & possessionem retinere corpore & animo, & si talis se teneat in possessione, cōpetit dño assisa novæ disseysinæ. Sed si donator post talem seysinā, bonæ memoriæ existens, quāvis impotens sui, ratā habuerit donationem, & talem seysinā approbaverit, ex ratihabitione convalescit. Item sufficit p̄ traditione corporali nuda voluntas dñi ad

Britton, l. ii. ch. ix. § 1. Fleta, 200.

Britton, l. ii. ch. ix. § 6. Fleta, 201.

the vestures of donations, like delivery. For if any one buys a horse, it will be his own upon delivery itself, although he does use it immediately, and the same things may be said of vestures and such like. In the same manner, if any one has bought an estate, he cannot immediately plough nor cultivate it, because he perhaps has not oxen, nor a plough, nor any one whom he may employ, or the day is a holiday, and such seysine is sufficient, as regards a free tenement. Likewise he cannot take profits, because the time of mowing or of the vintage has not come. But if he has gathered fruit not ripe, or has thrown down trees, those things are not to be called profits, for they are rather for his loss than his advantage. The same may be said of pasture for cattle, because it is sufficient as regards seysine, that a person has the sight of it and the intention of possessing it, although he does not immediately put cattle upon it, and according to the due number. Likewise if delivery has not intervened, a long and peaceable seysine and a long enjoyment even of another person's property suffice in the place of delivery, as regards seysine and a free tenement, as if any one has had an entry into a vacant estate, possessed by nobody, as an inheritance not claimed, for long possession suffices for delivery, and is the parent of right. Likewise when a donation has preceded, and the donatory of his own authority without the donor or his proxy, or without a writ and a messenger, has put himself into seysine without delivery, such seysine is not valid. For the donor may change his intention before delivery, whilst the donation is imperfect, and may retain possession in body and in mind, and if such a person keeps himself in possession, the lord is entitled to an assise of novel disseysine. But if the donor after such seysine, being of good memory, although unable to govern himself, has ratified the donation and approved such seysine, it becomes valid from the ratification. Likewise it suffices for corporeal tradition, that there should be the bare intention of the lord [to transfer] to

alium, quasi mutata causa possessionis, dum tamen fiat cum solemnitate, quòd probatio non deficiat; ut si quis rem alicui locaverit, vel concesserit ad terminum vitæ vel annorum, & postea eidem vendiderit vel donaverit, licèt eam ex tali causa primò non habuerit, eò tamen, q ipse dominus patitur eam, ex tali causa vel alia qua-
f. 40 b. cunque, apud eum esse, sua efficitur. Eodē modo, si ex nulla justa causa p̃cedente, sed si p intrusionem vel disseysinā sit aliquis in possessione rei alteri[9], & velit dominus ꝑprietatis, quòd sua sit, sua erit, quamvis possessio apud verum dominum non fuerit; fingitur enim p voluntatem domini, q res quasi ex eo, & per manum suam, ad detentorem pervenerit, possessio & dominium. Item videndum, quid transferat, qui tradit, & sciendum est, q illud totum (& aliter quàm ipse teneat, & seipsum obligare potest), transferat ad eum, qui accipit, q est apud eum, qui tradit, ut si quis in fundo dominium habuerit & meī jus & ꝑprietatem feodi & liberum tenementum & usum fructuum, & totum[1] tradendo statim totum transfert ad donatorium. Et cùm animo tali transferatur fundus, & donator totum transferat, & donatorius totum recipiat, non sufficit q donatorius utatur in aliqua parte, sive in principali sive in ꝑtinentiis, nisi donator & omnes sui omnino à possessione exeant, quia donator utendo in parte per se vel suos, totum retinet fuudum cum ꝑtinentiis, quamvis donatorius in aliqua parte utatur, sive in principali sive in pertinentiis, quia per talem usum nihil acquirit. Sed si fiat inquisitio de usu, & inquiratur, quod donator in aliqua parte usus sit usq; ad mortem, nō erit ulteriùs inqui-

[1] "et totum," MS. Rawl. omits the particle "et."

another, as if the reason of the possession was changed, provided however it be done with a solemnity, that proof may not be wanting; as if a person has let or granted to another a thing for a term of life or of years, and has afterwards sold or given it to him, although he had it not at first upon that consideration, nevertheless from the fact, that the lord allows it on such or some other consideration to remain with him, it is made his own. In the same manner if from no rightful cause preceding, but if by intrusion or disseysine a person be in possession of the estate of another, and the lord of the property intends that it should be his own, it will be his own, although the possession is not with its true lord, for there is a feigned possession and dominion through the assent of the lord, because the estate has come to the holder of it, as it were from him and through his hand. Likewise we must see what he, who delivers, transfers, and it is to be known that he transfers to him, who accepts, the whole of that, which is with him, who delivers it (and otherwise than he himself holds it, and he may bind himself), as if a person has the dominion in an estate and the absolute right and the property of the fee, and the free tenement and the use of the fruits, by delivering the whole he transfers immediately the whole to the donatory. And when an estate is transferred with such an intention, and the donor transfers the whole, and the donatory receives the whole, it is not sufficient that the donatory uses it in any one part, whether in the priucipal part or in the appurtenances, unless the donor and all his [people] go out of possession altogether, for the donor, in using it in part by himself or by his people, retains the whole estate with the appurtenances, although the donatory uses it in part, either as regards the principal estate or its appurtenances, because by such an use [the donatory] acquires nothing. But if an inquisition is held concerning the use, and it be ascertained that the donor has used it in some part up to his death, it is not to be enquired

f. 40 b.

renđ, si donatorius in aliqua parte usus fuerit, quia ita inquisitio esse debet, cùm donatorius ex ea nil debeat consequi. Et semper videnđ est, q̃ sit res principalis, q̃ venit in donationem, utrum inde terra, fūdus, vel manerium vel dom⁹, & tunc qualis debet èsse traditio, & qualis usus. Si autem totum nō habuerit statum, transfert id q̃ hàbet, & si non nisi usum fructuum tantùm, tamen statim facit suo feoffato libeř tenementum, quantum ad se & alios, qui jus non habent, sed quātū ad veř dominum, non nisi post tempus. Si autem nihil omnino habuerit, qui tradit, nec aliquā seysinā, ad eum, qui accipit, nil transfert, quia dare & transferre nō potest nec tradere, id q̃ non habet. Cùm autem dominium tradatur, transfertur ad accipientem tale dm̃, quale fuit apud eum, qui tradidit, ut, si fundus fuerit serv⁹ vel onerat⁹, transfertur cum servitutib⁹ & onere, nisi donator in se susceperit onus in ipsa donatione, in toto vel in parte, si autem liber fuit fundus, transfertur tunc, uti fuit. Item si donator libeř fundum esse dixerit cum tradiderit, qui re vera serv⁹ fuerit, nihil jure servituti fundi detrahit, sed obligat se debere præstare, q̃ dixerit. Si autem fund tradiderit cum pertinentiis & servitutib⁹, p̃tinentias & servitutes transfert ad eum, qui accipit, & si nihil aliud transferre poterit donator ad accipientem, quā ipse habuit, ut si nō nisi nudum usum, vel si usum fructuum, tamen ad aliud transfertur quoad accipientem, sc. ad jus merum, feodum & liberum tenementum, quia ex eo, quod quis, in possessione fuerit quali quali, poterit hæc omnia facere suo feoffato, quoad dominium, vel saltem quoad excambium, licèt dominus

further if the donatory has used it in any part, for the inquisition ought to rest there, since the donatory ought not to obtain any thing of it. And we must always consider what is the principal thing which came into donation, whether, for instance, land, an estate, or a manor, or a house, and then what ought to be the delivery and what the use. But if he had not the whole estate, he transfers that which he had, and if only the use of the fruits, he immediately makes to his feoffee a free tenement, as far as regards himself and others who have no right, but as regards the true lord, only after a time. But if he who delivers had nothing at all nor any seysine, he transfers nothing to him who accepts, for he cannot give nor transfer nor deliver that which he has not. But when the lordship is tranferred, such a lordship is transferred to the acceptor, as belonged to him who delivered it, as for instance, if it was an estate subject to services or to a charge, it is transferred with the services and with the charge, unless the donor has taken upon himself the charge in the donation itself, in whole or in part, but if the estate be free, it is transferred then as it was. Likewise, if the donor has said that the estate was free, when he delivered it, when it was in reality subject to a service, he detracts of right nothing from the service of the estate, but binds himself to make good what he has said. But if he has delivered an estate with the appurtenances and services, he transfers the appurtenances and the services to him who accepts, although the donor shall not be able to transfer to the acceptor anything else, than what he himself had; as if he had nothing else than the bare use, or the use of the fruits, nevertheless it is transferred in other respects as regards the acceptor, namely, in respect of the absolute right, the fee, and the freehold, from the circumstance, that a person, who was in any kind of possession, may do all these things for his feoffee as regards the dominion, or at least as regards an exchange, although

rei non extiterit. Sed statim non efficitur accipiens dominus, nisi post seysinam pacificam & longam, quantum ad verum dominum, & unde si verus dominus recenter eum ejecerit, per assisam non recuperabit, si donator plenū jus in re non habuit, ut, si non nisi ad vitam tenuerit, vel non nisi usum fructuū vel nudum usum habuerit. Si autem donator talem ejecerit, vel
f. 41. ali⁹ qui jus non habuerit, versus omnes tales quolibet tempore ꝑ assisam recuperabit. Si autem donatio & traditio facta fuerit de eadem re uni ab uno dño, & alii à non dño, traditio facta à dño prævaḷebit, & idem si à duobus, quia una poterit revocari, & altera non. Item si à duobus non dominis fiat donatio & traditio de eadem re uni vel duobus, utraq; à vero dño poterit revocari, & quantum ad donatorios, ille præfertur, qui priùs fuit in seysina. Et idem dici potest de duob⁹, quibus dñs vel non dñs donationem vel traditionem fecerit, & unde versus,

" Rem domino, vel non domino vendente duobus,
" In jure est potior traditione prior."

Item videndum, qualiter donatorius, & per quem poni debeat in seysinã, & sciendum, q ꝑ seipsum vel ꝑ ꝓcuratorem quemcunq;, hominem ꝓprium vel alienū, qui nomine suo recipiat seysinã, sive cùm absens dñs sit hoc fiat, sive præsens, vel cùm hoc sciat vel ignoret,
Dig. XIX. i. § 21, 2. dum tamen, cùm sciverit, cōsentiat. Item seysinã accipere potest quis, absens vel præsens, sciens vel ignorans, si ille qui in seysina fuerit ad ĩminum vitæ vel annorum, attornatus fuerit donatorio, & cùm ipse de voluntate sua se attornaverit ei, & ei fecerit servitium, ita quòd donatori⁹ fuerit in seysina ꝑ se vel ꝑ attornatū suum, per hoc, quòd sit notorium, quòd veritas

he is not the lord of the realty. But the acceptor does not become forthwith lord, except after peaceable and long seysine, as regards the true lord, and hence if the true lord ejects him recently, he shall not recover by an assise, if the donor had not full right in the thing, as if he only held it for life, or if he only had the use of the fruits, or the bare use. But if the donor, or another, who had no right, has ejected him, he shall recover by an f. 41.
assise. But if a donation and delivery of the same thing has been made by the lord to one person, and by one who is not the lord to another person, the delivery made by the lord shall prevail, and the same if by two persons, because one may be revoked, and the other not. And if a donation and delivery of the same thing has been made by two persons, who were not the lords, to one or to two persons, each may be revoked by the true lord, and as regards the donatories, he is preferred, who is first in seysine. And the same may be said of two persons, to whom the lord or the non-lord has made a donation or a delivery, and hence the verses—

" When the lord or non-lord has sold to two,
" The prior in delivery has the preferable right."

Likewise we must see in what ways and by whom the donatory ought to be put into seysine, and it is to be known, that he may be [put into seysine] either by himself or by a proxy [who may be] any man, either one of his own or one of an other's, who receives seysine in his name, either when this is done when the lord is absent or is present, or when he knows it or is ignorant of it, provided only he consents when he knows it. Likewise any one may accept seysine, absent or present, knowing or ignorant, if he who is in seysine either for the term of his life, or [for a term] of years, has been attourned to the donatory, and when he has of his own will attourned himself to him and done service to him, so that the donatory has been in seysine either by himself or by his attorney, so that it is notorious by this means that the

possit ꝑbari, qui si fuerit ejectus ꝑ donatorem recuperabit. Si autem per aliū, ad quem non ꝑtinet, & donatorius portaverit assisam, vocand⁹ erit donator, & si ratā habuerit donationem, recuperabit donatorius, et si irritā, primò discutiatur inter eos, & postmodùm ꝓcedat assisa versus extraneum, vel non ꝓcedat.

3. Qualiter fieri debet traditio, et quæ sufficiunt ad traditionem.

Acquiritur res per traditionem, quia traditionib⁹ & usu captionibus, &c. Et ꝙ dicitur, traditione acquiri possessionem, regulariť quidem verū est, ꝙ inter vivos non acquiritur dñium sine inductione in possessionem; sed tamē aliquādo acquiritur benè sine possessione vacua. Illa enim verba, in vacuam possessionem, dicuntur demōstrativè & nō causativè. Regulariť autē dixi ideò, quia quādoq; sine traditione transit dñium & sufficit patientia, ut si tibi vendā, ꝙ tibi accommodavi, aut apud te deposui vel ad firmā vel ad vitā, & si ꝙ ad vitā, vendo tibi in feodo, & sic mutaverim casum possessionis, hoc fieri poterit sine mutatione possessionis. Ex hoc enim, ꝙ patior rem meā esse tuā ex aliqua causa, vel apud te esse, videor tradere. Idē est de mercib⁹ in orreis. Idē etiā dici poterit & assignari, quādo res vēdita vel donata est in cōspectu, quam vēditor vel donator dicit se tradere, ut si ducat' in orreū vel campū. Itē retentio usus fructus, & traditio instrumenti rei de firma & t̄mino ꝑ traditione accipitur. Item illud idem poterit assignari, cùm rem illā, quàm tibi donavi & non tradidi, cōducam à te, sic videor tradere. Item, si rei petitæ acceperim p̄cium, ut si petam à te rem meā, & res sit in præsenti, trāsfero ꝓprietatē in emptorē, si emptor posteà nanciscatur possessionē volūtate mea. Item, si res animo vacua non

truth can be proved, so that, if he shall be ejected by the donatory, he shall recover. But if by another, to whom it does not belong, and the donatory brings an assise, the donor is to be called, and if he ratifies the donation, the donatory shall recover, and if he annuls it, let it first be discussed between them, and afterwards let the assise proceed against the stranger or not [as the case may be].

3. In what ways delivery ought to be made, and what things are sufficient for delivery.

A thing is acquired by delivery, because by deliveries and usucaptions, &c. And when it is said, that possession is acquired by delivery, it is regularly true, that between living persons dominion is not acquired without induction into possession, but nevertheless it is sometimes well acquired without a vacant possession. For those words, "into the vacant possession," are used demonstratively, but not causatively. I have said "regu-" larly" for this reason, for sometimes dominion passes without delivery, and sufferance is sufficient; as if I sell you what I have lent you or deposited with you either to farm or for life, and if what [I have deposited with you] for life, I sell to you in fee, and so I have changed the case of possession, this may be done without a change of possession. For from this circumstance that I permit my realty to become yours or to remain with you for some cause, I seem to deliver it. It is the same with goods in warehouses. The same may be said and assigned, when the thing sold and delivered is in sight, which the seller or donor says that he delivers, as if he be taken into a warehouse or a field. Likewise the retention of the usufruct and the delivery of the deed of a thing to farm and for a term is taken for delivery. Likewise the same may be assigned, when I hire from you the thing, which I have given you and not delivered, I so seem to deliver it. Likewise if I have received the price of the thing claimed, as if I claim from you my thing and the thing is present, I transfer the property to the buyer, if the buyer afterwards acquires possession with my will. Likewise if the thing is not vacant in

fuerit, ut si dos, vel alio modo ad vitā trāsferri poterit ꝑ ea parte quæ vacua fuerit, ut si ego do doñium et ꝑprietatē & liberū teneñtum, & aliꝰ usum fructuum, ꝙ meum est transferre potero, sine præjudicio usufructuarii. Item ꝙ meum est, si habuero ꝑprietatē, & aliꝰ liberum teneñtum, quòd meum est, &c., sed ita, ꝙ ille qui ita partim nomine meo & partim suo proprio at-
f. 41 b. tornatus fuerit donatorio, sicut fuit donatori, & ipse se attornaverit sicut warranto suo, & ita ꝙ donator nec hæredes sui nunquā habeant regressū aliquo tēpore, &c. Item sufficit ꝑ traditione, etsi traditio non ꝑcedat, ratihabitio donatoris, si in pura volūtate præstiterit cum memoria bona. Item oportet, ꝙ vestita sit traditio, et non nuda, s. ꝙ traditionem præcedat vera causa, vel putativa, qua transeat dñium. Et illud nō refert, utrū tradat dñs an aliꝰ, ejus tamen voluntate. Et non refert multum, utrū præcedat vel subsequatur voluntas, ut, si ꝑcurator liberā habens administrationē negotiorū universorū, si talis vendiderit & tradiderit, rem facit accipientis, voluntate dñi subsequuta. Itē contra voluntatē dñi quādoq; transfertur dñium, s. ꝑ judicē, quia judiciū ruit in invitum. Et hoc non fit tantū inī vivos, sed etiā in ultima voluntate, dum tamē donator bonā habeat memoriā, sicut fieri solet inī vivos. Item quædā transeunt cum universitate, licèt de eis specialiī nō fiat mentio, sicut sunt ꝑtiñ et jura. Itē in incertā psonā, sicut sunt missibilia. Itē sine traditione, res habita ꝑ derelicta, ubi dñs statim desinit esse dñs, si autē causa navis alleviandæ, nō sic, quia non ea voluntate ejecit

intention, as a dowry or otherwise for life, it may be transferred as regards that part which is vacant, as if I give a donation and the property and the freehold, and another [has] the usufruct, I may transfer what is mine without prejudice to the usufructuary. Likewise what is mine, as if I have the property, and another the free tenement, what is mine, &c., but so, that he who thus partly in my name, partly in his own name, has been attourned to the donatory, as he was to the donor, and f. 41 b.
has attourned himself, as to his own warrantor and so that neither the donor nor his heirs shall ever have a re-entry at any time, &c. Likewise the ratification of the donor, if he has made it in absolute willingness with a good memory, is sufficient for delivery, although delivery does not precede. Likewise it is necessary that delivery should be clothed and not be nude, that is, that a true or putative consideration, wherefore the dominion passes, should precede the delivery. And it is not of importance, whether the lord or another delivers it, provided it is with his will. And it does not much matter whether the will precedes or follows, as if a proxy having a full administration of all affairs, if such a person should sell and deliver, he makes the thing the acceptor's, if the will of the lord follows. Likewise dominion is sometimes transferred against the will of the lord, as by a judge, because a judgment falls upon the unwilling. And this takes place not only between the living, but even in the last will, provided only the donor has a good memory, as is accustomed to be done between the living. Likewise some things pass with a corporation, although no special mention of them is made, such as appurtenances and rights. Likewise [some things pass] to an uncertain person, such as letters missive. Likewise without delivery, a thing taken to be derelict, where the owner forthwith ceases to be the owner; but if [it is cast over] for the sake of lightening the ship, not so, since the owner has not cast it over-

quis, ut desinat esse dñs, vel nolit, si autem ea mente ut nolit esse dñs, aliud erit. Item sine traditione, si velit quis id, q̄ est apud te disseysina vel intrusione tuum sit, &c., remaneat tanquā datum vel venditum.

Inst. II. i. § 47.

4. Facta traditione, videndum est, quando donatorius incipit possidere, et quando donator dimittit.

Videndū est etiā, quando donatorius post traditionem incipit possidere, et donator desinit, & tunc refert, utrum donatorius fuerit in possessione p̄ se, et vacuā habuerit seysinā sine donatore vel suis, vel si donator fuerit in possessione simul cū donatorio, vel aliquis de suis nomine suo. Et sciendū, q̄ donator nunquā desinit possidere, antequā donatori⁹ possidere incipiat, quia uno incipiente desinit ali⁹, dum tamen donatori⁹ in possessione fuerit vacua, et donator & sui extra possessionē extiterint corpore & animo possidendi, et donatori⁹ in possessione corpore p̄prio vel alieno nomine suo cum animo possidendi, & sic desinit donator & incipit donatori⁹ possidere. Desinit donator possidere, cùm corpore & animo donandi & transferendi ad donatoriū, se posuerit extra seysinā, corpore dico, p̄prio & suorum, & incipit donatori⁹, cùm ingressus fuerit vacuā possessionē p̄ se, vel p̄ suos, i. corpore p̄prio vel suorū cum animo possidendi & retinendi, & sic desinit unus & incipit alius. Sed qualiṫ p̄pendi poterit, quo animo donator donationem fecerit? cùm sol⁹ Deus cor hominis intueaṫ, & homo secūdùm faciē judicare oportet p̄ exteriora, secundū opera exteriora, et secundū visum et intellectum hominū, dicere enim poterint, vidim⁹, q̄ talis gratis & voluntate sua exivit & sine aliqua coactione, et q̄ donatori⁹ liberè intravit. Et sciēdū, q̄ animo & corpore simul acquiriṫ possessio, & nō corpore

Britton, l. ii. ch. ix. § 3.
Fleta, 201.
Dig. XLI. ii. § 3.

board, that he may cease to be or is unwilling to be the owner, but if with such an intention that he is unwilling to be the owner, it will be otherwise. Likewise without delivery, if any one wishes that which is in your power by disseysine, or is yours by intrusion, &c., let it remain as if given or sold.

4. When delivery has been made, we must see when the donatory begins to possess, and when the donor demises.

We must see when the donatory after delivery begins and the donor ceases to possess, and then it is of importance, whether the donatory be in possession by himself, and has a vacant seysine without the donor and his people; or if the donatory be in possession at the same time with the donor, or some of his people in his name. And it is to be known, that the donor never ceases to possess, before the donatory begins to possess, for when one begins, the other ceases, provided however the donatory be in vacant possession, and the donor and his people are out of possession corporeally and mentally, and the donatory is in possession in his own person or in another's person in his own name with the intention of possessing, and so the donor ceases and the donatory begins to possess. The donor ceases to possess, when bodily and with the intention of giving and transferring [a thing] to the donatory, he puts himself out of seysine, bodily I say as regards himself and his people; and the donatory begins, when he enters upon a vacant possession by himself or by his people, that is with his own body or with their bodies with the intention of possessing and of retaining, and so one ceases and the other begins. But how is it to be inferred with what intention the donor has made a donation? since God alone beholdeth the heart of man, and man must judge according to the face, by what is outward according to outward acts, and according to the vision and the understanding of men, for they may say, we have seen that such a person went out gratuitously, and with his will and without any compulsion, and that the donatory entered freely. And it is to be known that possession is acquired with the

Azo in Cod. vii. p. 740.

p se nec animo p se, & sicut acq̃riť utroq;, ita nō amittiť nisi utroq;, quia si quis à possessione ejiciatur, nō amittit statim utrāq; possessionē, naturalē et civilē, quia animo retinere potest civilē, licèt fuerit extra possessionē, secūdū q inferi^{9} dicitur de assisa.

5. Quod solo corpore retinetur possessio.

Itē, solo corpore, q nō est multū in usu, sine animo, ut post mortē alicuj^{9}, donec corp^{9} efferatur ad sepulturā, quia ante nō erit possessio vacua, quādo animo vel corpore retineatur, et cùm corp^{9} efferatur, jam utroq; desinit possidere, & de hac materia dicetur pleniùs infrà de assisa. Item desinūt quidam possidere in veritate, quidā quoad opinionem hominum, quia imaginaria poterit esse donatio, & similiter traditio, quia poterit quis naturaliter possidere verè & justè, et ctiā naturaliter injustè, et non verè. Est enim naturalis possessio justa et injusta, justa, ut si justa facta traditione extiterit donatori^{9} in possessione vacua, et p se; naturalis et injusta, ut si, cum donator donatorium induxerit in possessionem, ambo simul remanserint in possessione, et quo casu, dum donatori^{9} in possessione fuerit, si utatur ut pri^{9}, & statum non mutaverit, uterq; habebit naturalem possessionē, sed donator justā, et donatori^{9} injustā, et idem erit, si uterq; utatur ut dñs, quia donator utendo possessionē suam cōtinuat, & donatori^{9} utendo nihil sibi acquirit. Si autem donatori^{9} utatur, ut dñs, et donator non, adhuc non incipit donatori^{9} possidere, quia vacuā non habet possessionem. Et idē dici poterit de familia donatoris, ut si cùm donator donatorium in possessionem induxerit, & sic

f. 42. Britton, l. ii. ch. ix. § 7. Fleta, 202.

mind and with the body together, not with the body by itself, nor with the mind by itself, and so it is acquired with both, and so it is not lost except with both ; because if a person is ejected from possession, he does not forthwith lose both kinds of possession, the natural and the civil, for he may retain mentally the civil possession, although he is out of possession, according to what will be explained below concerning the assise.

5. That possession is retained with the body alone.

Likewise with the body alone, which is not much in use without the intention, as after the death of any one, until the corpse is carried forth to burial, because before [that] the possession will not be vacant, whilst it is retained in mind or in body, and when the corpse is carried forth, then it ceases to be possessed by both ; and on this [subject] more will be said below [in treating] of the assise. Likewise some cease to possess in truth, some f. 42. according to the opinion of men, for donation may be imaginary, and similarly delivery, because a person may naturally possess truly and rightfully, and likewise naturally, but wrongfully and not truly. For natural possession is rightful or wrongful—rightful, as if after a rightful delivery has been made, the donatory has been established in a vacant possession and by himself; natural and wrongful, as if when a donor has inducted a donatory into possession, both have remained at the same time in possession, and in which case, whilst the donatory has been in possession, if he uses it as before, and has not changed his state, each will have natural possession, but the donor will have a rightful and the donatory a wrongful possession, and it will be the same, if either uses it as the lord, because the donor by using it continues his possession, and the donatory by using it acquires nothing for himself. But if the donatory uses it as the lord, and the donor not, still the donatory does not begin to acquire, because he has not a vacant possession. And the same may be said concerning the family of the donor, as if when the donor has inducted a

corpore ꝑprio & animo recesserit, relictis ibi in possessione uxore et pueris, vel alia familia nomine donatoris, licèt donatori⁹ teneñto utatur, tamē ꝑ talē usum nihil acquirit, prædicta ratione, quia vacuā non habet possessionem. Item esto, ꝙ cùm donator donatorium in possessionē induxerit, et simul in possessione extiterint ꝑ aliquod temp⁹, et simul à possessione recesserint, quia poterit esse donatio & traditio imaginaria & fictitia, de veritate et partiū voluntate et animo constare non poterit, nisi ꝑ usum. Per usum enim, in hoc casu, declarari poterit veritas, et in hoc casu est usus necessarius, quia quāvis ꝑ inductionem in possessionem præsumi posset donationem et traditionem esse veram, et cui standum erit donec ꝑbetur in contrarium, tamen posset donator ipso facto docere cōtrarium, utendo (ut priùs) per se, vel ꝑ suos, & ꝑ factum tale vincitur præsumptio, eò ꝙ facit cōtrarium facto præcedenti, ꝑ exteriora enim præsumi poterit de interiorib⁹, secūdùm ꝙ dicitur,

"Monstrat per vultum, quid sit sub corde sepultum,"

& multò fortiùs mōstrare poterit ꝑ factū. Item cùm ambo simul à possessione recesserint, injungat donator familiæ suæ, ꝙ sit intēdens donatorio, sicut dño, in omnib⁹ vel cum sacrañto vel sine, et si sic factum fuerit, sufficiens erit donatio & traditio; si autem fecerit cōtrarium, ita poterit esse donatio et traditio imaginaria, & nō vera, maximè si donator reversus negotium sic gestum ratum habuerit. Si autē hoc nō approbaverit, firma erit donatio, et tenebitur familia donatorio ꝑ actionē negotiorum gestorum. Sed esto, ꝙ,

donatory into possession, and so has withdrawn with his own body and mind, the wife and boys, or another family in the name of the donor being left in possession in the name of the donor, although the donatory uses the tenement, yet he does not through such use acquire anything, for the aforesaid reason, because he has not a vacant possession. Likewise let it be, that when the donor has inducted a donatory into possession and they have been established in possession together for some time, and they have withdrawn from possession simultaneously, because the donation and delivery may be imaginary and fictitious, it cannot be ascertained respecting the truth and the will and intention of the parties except through the use. For through the use in this case the truth may be cleared up, and in this case the use is necessary, because although through induction into possession it may be presumed, that the donation and the delivery are true, and by which we ought to abide, until the contrary be proved, yet the donor might in fact prove the contrary, by using it (as before) either by himself or by his people, and by such a fact the presumption is overcome, because it works contrary to the preceding fact; for it may be presumed from externals concerning internals, according to the saying, "He shows by his "countenance, what is hidden beneath his heart," and he may show it much more strongly in fact. Likewise when both have withdrawn at the same time from the possession, let the donor enjoin on his household that they should wait upon the donatory, as their lord, in all things, whether with an oath or without one, and if it be so done, the donation and the delivery will be sufficient; but if he does the contrary, the donation and the delivery may be imaginary and not true, more particularly if the donor, having returned, has ratified the business so executed. But if he has not approved this, the donation will be firm, and the household will be liable to the donatory by an action on the case. But let it be,

cùm quis donationē fecerit et traditionem, fructᵒ exceperit, tunc refert, utrum extantes vel futuros. Extantes verò benè poterit excipere, quia ꝑ extantes nō impeditur donatoriᵒ, quin possit statim uti & frui, si verò futuros, tunc refert, utrū ad certum tempᵒ vel imperpetuum. Si autem non possit uti frui ante tempᵒ, ꝑfecta erit possessio quoad liberū teneñtū, plenaria tamē nō erit ante usum fructuum. De hoc autē q̃ dicitur, q̃ vacua debet esse possessio, duo principaliť exiguntur, q̃ ꝑfecta sit alicujᵒ rei donatæ donatio et traditio, ad hoc q̃ competat actio donatorio contra donatorē, s. quòd res tradatur, & quòd sequatur missio rei in vacuā possessionē ; vacua enim possessio tradi non intelligitur, si quis eam possiderit ꝑ se, vel si quis in eadem pos-
f. 42 b. sessione fuerit, sicut ꝑcurator, colonus, vel inquilinus, hospes, servᵒ, vel amicus, licèt subjectᵒ non sit ei, cujᵒ nomine est in possessione, cùm non sit in seysina nomine donatorii. Itē si cùm ambo fuerint in possessione, sive simul utantur, sive non, in parte vel in toto, sive imaginaria sit donatio sive non, & donatorem pœnituerit fecisse traditionē, & donatoriū ejecerit, nō recuperabit ejectus per assisam, quia vacuam possessionē non habuit, eò q̃ donator à possessione nō recessit. Et è cōtrario, si donatorius donatorem, donator recuperabit ꝑ assisam prædicta ratione, quia nunquā desiit possidere. Item cùm donator donatoriū in possessionem induxerit & statim recesserit, & postmodùm sine mora reversus, sub colore hospitandi hospitium petierit, adhuc esse poterit donatio imaginaria, et non

that when one has made a donation and a delivery, he has excepted the fruits, then it is of importance whether he has excepted the existing or the future fruits ; because he may well except the existing [fruits], because the donatory is not impeded by the existing [fruits] from forthwith using and enjoying ; but if the future [fruits], then it is of importance whether for a certain time or in perpetuity. But if he cannot use and enjoy before a certain time, the possession will be perfect as regards the freehold, but it will not be plenary before the enjoyment of the fruits. But concerning this, when it is said, that the possession should be vacant, two things are principally required, that the donation and delivery of a thing given should be perfect, to the effect that an action will lie on behalf of the donatory against the donor, for instance, that the thing be delivered and that there should be an admission into the vacant possession of the thing ; for a vacant possession is not understood to be delivered, if any one possesses it by himself, or if any one shall be in the same possession, as an agent, a husbandman, or a f. 42 b. lodger, a guest, a servant, or a friend, although he be not subject to him, in whose name he is in possession, when he is not in seysine in the name of the donatory. Likewise when both are in possession, whether they use it together or not, in part or in whole, whether the donation be imaginary or not, and the donor has repented that he has made a delivery and has ejected the donatory, the party ejected shall not recover by an assise, because he had not a vacant possession, inasmuch as the donor had not withdrawn from possession. And on the other hand, if the donatory [has ejected] the donor, the donor shall recover by an assise for the aforesaid reason, because he has now ceased to possess. Likewise, when the donor has inducted the donatory into possession, and has forthwith withdrawn, and afterwards having returned without delay, has sought hospitality under the character of a guest, the donation may still be

Britton, l. ii. ch. ix. § 10.

vera. Sed & tunc refert, utrum sub eodem colore admittatur, vel repulsus fuerit; si autem repulsus, per assisam non recuperabit, quia de sua voluntate & non cōpulsus exivit, & rata & firma erit donatio, ex quo semel voluerit. Si autem gratis admittatur, tunc videndum, utrum se gerat ut dñs, sic utendo, agendo & præcipiendo sicut priùs, & si hoc egerit, tunc videtur quòd animo à possessione non recessit, sed illam animo poti^{9} cōtinuavit. Si autem post longū temporis intervallum redierit, & donatorius in medio tēpore in possessione extiterit, & ꝑ se usus fuerit, erit traditio bona, quia tēpus purgat vitiū, et maximè ex nova cōventione, si conventio de novo intervenerit, & sic tenere poterit donatio et valere, quāvis fruct^{9} et alia in usus ꝑprios cōvertat tēpore vitæ suæ. Videtur etiā (sine præjudicio melioris sentētiæ) ꝙ sive statim redierit, postquā semel exiverit, sive non, si sic non agat ut dñs, sed statum suum ex toto mutaverit, ꝙ agat ut ꝑcurator, vel seneschallus, vel serviens, ubi priùs fuit dñs, et ꝙ sit ministrator, ubi priùs major & præceptor, nō erit talis donatio vel traditio imaginaria, quia ꝑ factum & usum veritas declaratur. Itē cùm ambo fuerint in possessione, et donator semel exiverit, et cùm regredi voluerit, nō possit, vel cùm donatori^{9} in possessione fuerit, pœnituerit donatorem donationis & ingredi non possit, ponat se in aliquā partē terræ donatæ, facit donatorio disseysinam, quia licèt donatorius totū fundū non circumiverit, vel in omni parte nō extiterit, tamen

imaginary and not true. But then it is of importance, whether he has been admitted under the same character, or has been repelled: if indeed [he has been] repelled, he shall not recover by an assise, because he went forth of his own will and without compulsion, and the donation will be ratified and firm from the time, when he was once willing. But if he be admitted gratuitously, then it is to be seen, whether he conducts himself as the lord, using, and acting, and giving orders just as before, and if he has so done, then it seems that he has not withdrawn in intention from the possession, but has rather continued it mentally. But if he has returned after a long interval of time, and the donatory has stayed in possession during the intermediate time, and has used it in his own behalf, the delivery will be good, for time purges the defect, and particularly after a new covenant, if a covenant anew has intervened, and so the donation may bind and be valid, although he may convert the fruits and other things to his own uses in the time of his own life. It seems, however (without prejudice to a better opinion), that whether he has returned forthwith, after he has once gone away, or not so, if he does not so act as the owner, but changes his state altogether, so as to act as an agent, or a steward, or a servant, where he was formerly the lord, and that he is a helper where he was formerly a master and gave orders, such a donation or delivery will not be imaginary, because the truth is declared by the fact and the practice. Likewise, when both have been in possession, and the donor has once gone out, and when he wished to return, could not; or when the donatory was in possession, the donor has repented of the donation, and he can not enter; should he place himself in any part of the land given, he makes a disseysine to the donatory; because although the donatory has not made the circuit of the whole estate, or has not been in every part, nevertheless he has acquired the

ex ipsa traditione totum acquisivit, cùm tẽpore traditionis eo animo seysinã nact⁹ sit, q̃ totum fundũ cum p̃tinentiis possideat usq̃ ad t̃minos, et eò quòd donator in traditione nihil sibi excepit, quòd si excepisset, aliud esset. Itẽ esto, quòd donator in donatione et traditione excipiat, ne donatori⁹ uti possit vel frui, talis donatio p̃fecta erit, licèt inefficax et effectũ non habeat vel p̃fectionẽ. Itẽ esto quòd p̃curator negotia gerens sui dñi, rem emerit in absentia dñi sui, vel stipulat⁹ fuerit ex causa donationis, & facta traditione recedat donator animo & corpore, et p̃curator nomine domini sui in possessione extiterit corpore et animo retinendi, et, cùm dñs inde certiorat⁹ fuerit, factũ p̃curatoris non approbaverit, et venerit aliquis à latere, & p̃curatorẽ ejecerit, videndũ, cui cõpetat assisa, non donatori, quia animo & corpore recessit à possessione; itẽ nec p̃curatori, quia nomine suo non recepit, sed alieno; itẽ non dño p̃curatoris, quia factum p̃curatoris non approbavit. Videtur igitur q̃ cum disseysitore
f. 43. remanebit, q̃ esset iniquum, cùm ex maleficio suo non debet lucrum reportare. Revera cõpetit assisa donatori, quia licèt animo & corpore recesserit, tamen possidere non desiit, ex quo donatori⁹ possidere non incepit. Item incipit quis possidere, quando de voluntate donatoris nact⁹ fuerit possessionem vacuã corpore & animo retinendi, p̃ ipsum donatorẽ vel ej⁹ p̃curatorem, p̃ literas vel p̃ nuntiũ, secundùm q̃ prædictum est. Sed cùm p̃curatorem miserit vel nuntiũ, ante traditionẽ

whole by the delivery itself, since at the time of the delivery he has acquired seysine with that intention, that he should possess the whole estate with its appurtenances as far as its boundaries, and from the circumstance that the donor in the delivery has excepted nothing; but if he had excepted, it would be otherwise. Likewise let it be, that the donor in the donation and in the delivery excepts, that the donatory may not use or enjoy the fruits, such a donation will be perfect, although inefficacious and it has no effect or completeness. Likewise let it be, that the agent conducting the business of his lord, has bought a thing in the absence of his lord, or has made a stipulation in a matter of donation, and after delivery has been made, the donor draws back in mind and in body, and the agent in the name of his lord has been in possession corporeally and with the intention to retain it, and when the lord has been informed thereof, he has not approved the act of his agent, and some one has come from aside and ejected the agent, we must see who is entitled to an assise; not the donor, because he has withdrawn mentally and bodily from the possession; nor the donatory, for he has not accepted it in his own name, but in another's; nor the lord of the agent, because he has not approved the act of his agent. It seems therefore that it will remain with the disseysor, which would be unjust, since he f. 43. ought not to obtain an advantage by his own wrongful act. The donor is in truth entitled to an assise, because although he has withdrawn both mentally and bodily, nevertheless he has not ceased to possess, since the donatory has not begun to possess. Likewise a person begins to possess, when with the will of the donor he has obtained vacant possession bodily and with the intention of retaining it, through the donor himself or his agent, by letters or by a messenger, according as has been said. But when he has sent an agent or a messenger, and the donor before delivery has repented of the donation, it is

pœnituerit donatorē donationis, quæritur, an donatio revocari possit ex pœnitentia; videtur q̄ sic. Sed refert, utrum cōstiterit p̄curatori vel nuntio de volūtate donatoris mutata vel non; si autē cōstiterit, non valebit donatio, licèt fuerit traditio subsequuta, si autē non, benè tenebit. Item esto, q̄ donator ante traditionem moriatur, sive hoc ignoraverit sive non, non valebit donatio. Et illud idē dici poterit de morte donatorii, si p̄ p̄curatorem adept⁹ fuerit possessionē. Itē esto, q̄ post donationem factā ante traditionem furere ceperit donator, vel esse non sanæ mentis, vel nō bonæ memoriæ, & postea subsequuta fuerit traditio, benè valebit donatio, quia voluntatē, quā habuit donator ante furorē, et quæ nō fuit revocata superveniente furore, mutare nō potuit, sive ipse donatori⁹, cū authoritate vel sine, se posuerit in seysinā, & ex quo donator nunquā mutavit voluntatē, quòd quidē, si donatori⁹ se posuerit in seysinā p̄pria authoritate, cùm donator esset sanæ mentis, vel si furiosus, dū tamē dilucidis gauderet int̄vallis, revocare vellet donationē, benè posset, quia nō int̄venit authoritas vel traditio seysinæ. Si autē donatori⁹ post donationē & ante tradititionem furere ceperit, vel esse non sanæ mētis, nō valebit donatio, vel traditio, quia licèt donator in voluntate tradēdi extiterit, tamē donatori⁹ animū retinēdi nō habet, nec recipiendi, et ideò donator nūquā desinit possidere, ex quo donatori⁹ incipere non potest. Itē sine traditione poterit quis incipere possidere, p̄ longā & pacificā seysinā et cōtinuum usum, licèt ali⁹ possidere nō desinat, quia dicitur superi⁹, quòd traditionib⁹ & usu

Britton, l. ii. ch. ix. § 11. Fleta, 202.

asked whether the donation can be revoked upon repentance, and it seems so. But it is of importance whether the agent or the messenger has been informed of the change of mind of the donor or not; if indeed he has been so informed, the donation will not be valid, although there has been subsequent delivery, but if not, it will not be binding. Likewise let it be, that the donor dies before delivery, whether he is ignorant [of the death] or not, the donation will not be valid. And the same may be said of the death of the donatory, if he has obtained possession through an agent. Likewise, let it be that after the donation has been made, and before the delivery, the donor has begun to be mad, or to be of insane mind, or of not good memory, and the delivery has been subsequent, the delivery will be valid, for the donor has not been able to change his intention, which he had before his madness, and which has not been revoked when his madness came upon him, whether the donatory has put himself into seysine with or without authorization, and, since the donor has never changed his intention; but indeed, if the donatory has put himself into seysine by his own authority, when the donor was of sane mind, or if, having become mad, whilst he still enjoyed lucid intervals, he wished to revoke the donation, he may well do so, because his authorization and his delivery of seysine has not intervened. But if the donatory after donation and before delivery has begun to be mad, or to be of unsound mind, the donation or [even] the delivery will not be valid, because, although the donor has had the intention to deliver, the donatory nevertheless has not the intention to retain nor to accept, and therefore the donor has never ceased to possess, since the donatory cannot begin to accept. Likewise a person without delivery may begin to possess by long and peaceable seysine and continual use, although another does not cease to possess, because it has been said above, that the lordship and the possession of things

captionib⁹ rerum dominia & possessiones transferunt̃. Item poterit esse seysina tenera & bona & firma. Ad q̃ brevit̃ notandum, q̃ nūquā erit tenera, nisi cōcurrāt jus & p̃prietas & seysina, ut si jus descendat alicui hæreditariè & se posuerit in seysinā vacuā sine cōtentione (vacuā dico animo & corpore), statim habebit liberū teneñtum in ipsa cōjūctione (sine cōtētione dico), secundū q̃ cōtentio justa fuerit vel injuriosa, & secūdùm q̃ inferiùs dicetur. Itē eodē modo, cùm jus & possessio cōjūcta sint vel fuerint, & unita in eadē p̃sona & sub eadē cōjūctione, ex quacūq; causa acquisitionis, cum ipsa re trāsferunt̃ ad aliū, ille qui accipit, statim habet utrūq; ; & p̃ cōsequens in ipsa traditione statim habet liberū teñtū. Si autē facta sit donatio de re aliena, vel cōtra cōventionē vel conditionē vel intrusionē vel disseysinā, nunquā erit ibi possessio firma & valida, sed tenera erit quousq; substantiā ceperit ex tēpore longo & pacifico, q̃ sufficere possit p̃ titulo, maximè cōtra verum dñm, vel contra cōventionem & cōditionem. Cōtra donatorē verò vel vēditorē & alios, q̃ jus nō habent, firma erit & valida, quātum ad tales, quia statim facit liberū teñtū in ipsa traditione, et sic adversus quosdā erit valida ab initio, invalida autem & tenera quantū ad alios.

f. 43 b.

6. Per quas personas acquiritur possessio.

Per quas personas nobis acquiratur possessio videndū est, et sciendum, quòd per nosmetipsos, et per liberos et per servos, quos sub potestate nostra habemus, scienter et ignoranter, dum tamen factum eorum et negotium necessarium fuerit et approbatum; per servos, tam illos qui sunt in potestate nostra, quàm extra potestatem. Item tam per alienos, quàm per p̃prios,

are transferred by deliveries and usucaptions. Likewise a seysine may be tender and good and firm. Upon which it may be briefly observed, that it will never be tender, unless the right and the property and the seysine concur, as if the right should devolve to some one by inheritance, and he shall have put himself into the vacant seysine without opposition, (I mean vacant bodily and mentally,) he will have forthwith the freehold in the very combination itself, (I mean without opposition,) according as the opposition has been rightful or wrongful, and according as will be explained below. Likewise, in the same manner, when right and possession are or have been conjoined and united in one and the same person and under the same conjunction, from whatever cause of acquisition, when they are in fact transferred to a third party, he, who receives, has forthwith each, and consequently in the very delivery he forthwith has the freehold. But if a donation has been made of another person's realty, or against a covenant or a condition, or an intrusion, or a disseysine, the possession never will be firm and valid, but it will be tender, until it has acquired substance from long and peaceable time, which may suffice for a title, particularly against the true lord or against a covenant and condition. But against a donor or a seller, or others who have no right, it will be firm and valid, as regards such persons, because it makes a freehold in the delivery itself, and so against some it will be valid from the commencement, but invalid and tender as regards others.

f. 43 b.

6. By what persons possession is acquired.

We must see by what persons possession is acquired, and it is to be known [that it is acquired] by ourselves, and by free persons and by serfs, whom we have under our power, with or without our knowledge, provided however their act and conduct has been necessary and approved; by serfs, as well those, who are within our power and those who are beyond it. Likewise by the serfs of other persons as by our own, provided we have posses-

dum tamen bona fide possideamus. Per ꝑprios acquirimus, qui sunt extra potestatem, sed tamen nihil accipimus, antequam corpora fuerint disrationata. Item per liberos acquirimus, sicut per ꝑcuratores, custodes, et curatores, ut si nomine nostro stipulati fuerint ꝑcuratores, vel custodes nomine nostro in possessione, et nos recognoverint ad hæredes. Dum tamen verum hæredem propinquum, vel ꝑpinquiorem recognoverint ad hæredem, et non antè. Et cùm hæres recognitus fuerit, et antè venerit et homagium fecerit, et obtulerit domino suo quicquid de jure facere debeat, quia non valet antequam ita fit; quia etsi verus sit hæres, poterit hæreditatem recusare, et unde, si dñs capitalis in seysina fuerit, donec sciverit quis sit hæres, vel donec hæres ad ipsum pervenerit facturus, &c., vel alia ratione quacunq;, quāvis dicat quòd sit in seysina nomine talis hæredis, non valet, quia per hoc non erit hæres in seysina. Si verò alius, quàm verus hæres, sit in seysina, vel verus hæres, & alius se faciat hæredem, si capitalis dñs homagium capere velit, sic illud capiat; salvo jure cujuslibet, vel talis nominati, qui se facit hæredem. Et eodem modo acquiritur surdo & muto naturaliter; licèt omnino audire nō possunt, neq; loqui, ad similitudinem ejus qui est infra ætatem, quia talibus descendit jus merum et proprietas, sicut aliis. Item ꝑ ꝑcuratores, cùm infra ætatem nobis facta fuerit donatio, & donator nobis dederit curatorem, quia minor affectum retinendi habere non poterit, non magis quàm furiosus sine curatore, quia non est aliud de eis nisi ad similitudinem ejus, qui dormienti pluviam in manum projecerit. Et qui accipere debet & retinere, oportet quòd habeat affectionē et intellectum ꝑcipiendi et retinendi. Item qui curare debet et custodiam habere, oportet eodem modo quòd habeat intellectum,

Dig. XLI. i. § 10. Inst. II. 4, § 3.

Dig. XLI. i. §§ 13, 16. Inst. II. i. § 20.

sion in good faith. We acquire by our own serfs, who, are beyond our power, but we nevertheless acquire nothing before their persons have been derayned. Likewise, we acquire through free persons, such as by agents, guardians and curators, as if agents have stipulated in our names, or guardians are in our name in possession and have recognised us as the heirs. Provided they have recognised the true next heir, or a next of kin as the heir, and not before. And when the heir has been recognised, and has presented himself and has done homage and has made such offering to his lord as he ought to do of right, because it is not valid, until it is so done; since, although he be the true heir, he may refuse the inheritance, and hence if the chief lord be in seysine, until he knows who is the true heir, or until the heir has come to him about to do &c., or in some other manner, although he may say that he is in seysine in the name of such an heir, it is not valid, for the heir will not be in seysine by this means. But if another than the true heir be in seysine, or the true heir, and another sets himself up to be heir, if the chief lord is willing to receive his homage, let him so receive it, saving the right of every one, or of so and so by name, who sets himself up to be heir. And in the same way acquisition is made naturally for a deaf man or a dumb man, although they cannot at all hear nor speak, after the likeness of him who is under age, because to such the absolute right and property devolve, as to others. Likewise through agents, when a donation has been made to us under age, and the donor has appointed for us a curator, because a minor cannot have the intention of retaining, no more than a madman without a curator, for it is not otherwise as regards them, than after the likeness of him, who has cast rain upon the hand of a person asleep. And he who ought to accept and retain, it is necessary that he have the intention and understanding of accepting and of retaining. Likewise, he who ought to have the care and custody [of a thing], it is necessary that he have the

quia si minorem vel furiosum, liberum vel servum miseris, ut possideas, nequaquam ꝑ eos videris possessionē apprehendisse, quia intellectum non habent. Item de servis, per servum enim alienum acquirimus,
Dig. XLI. t. i. 23. quando bona fide possidemus, quia credimus illum nostrum esse, non habentes conscientiam rei alienæ; ꝑ servum enim, quem scimus esse alienum, acquirere non possumus, nec etiam ipse aliquid domino suo acquirit, quia ab alio quàm à domino suo possidetur. Per communem autem servum acquirimus, etiam singuli in solidum, si ad hoc tamen agat servus communis, ut uni tantùm acquirat, si autem ad hoc non agat, tunc
Dig. XLI. t. i. 37, § 1. singulis acquiritur in communi. Item acquirimus per servum, in quem habemus usum fructuum, quamvis ipsum non possideamus, sicut ex operibus suis. Item acquiritur domino per ancillam, sicut per servum, i.
Dig. XLI. t. i. 10, § 1. per fœminam sicut per masculum. Item impubes per servum impuberem, dum tamen tutoris authoritate.
Dig. XLI. t. ii. 1, § 14. Item per servum, qui in fuga est, dum tamen à nullo possidetur, quia quamdiu ab alio non possidetur, à domino videtur possideri, vel donec exceptionem habuerit, ꝑ quam se tueri possit in statu libero, ut si dominus habeat actionem, servus habet exceptionem, si autem nullā, & dñs ꝑ actionem eum acquisiverit, omnia acquisita ꝑ servum dñs obtinebit, Item per servum acquiritur hæreditas, dum jacet non adita, quia hæreditas ibi est loco defuncti domini. Item si plures servientes sunt, per unum poterit hæreditas retineri. Et à simili videtur, quòd si plures tenentes teneantur ad redditum, si quidam partem solverint, per hoc totus

f. 44.

understanding, because if you have sent a minor or a madman, a free man or a serf, that you may have possession, you by no means seem to have taken possession through them, because they have not understanding. Likewise respecting serfs, for we acquire through the serf of another person, when we possess in good faith, for we believe him to be ours, not having the consciousness of another person's thing, for we cannot acquire through the serf of another person, whom we know to be such, nor does he acquire any thing for his lord, because he is possessed by another than his lord. But we acquire by a common serf, even singly for the whole, if indeed a common serf is acting for this purpose, that he should acquire for one person only; but if he is not acting for this purpose, then it is acquired for each in common. Likewise we acquire by a serf in respect of whom we have the usufruct, although we do not possess the serf himself, as for instance from his labour. Likewise the lord acquires through a female serf, as through a male serf, that is through a female as through a male. Likewise one under age through a serf under age, provided only with the authorization of a guardian. Likewise through a serf who is a fugitive, provided he is not possessed by any one, for, as long as he is not possessed by another, he seems to be possessed by his lord, or until he has raised an objection whereby he may f. 44
maintain himself in a free state, as if the lord should bring an action, and the serf raises an exception; but if he raises none and the lord by his action has acquired [possession of] him, the lord will obtain every thing acquired through the serf. Likewise an inheritance is acquired through a serf, whilst it lies unclaimed, for the inheritance is there in the place of the defunct lord. Likewise if there are several persons in serfage, the inheritance may be retained by any one of them. And in a similar manner it seems, that if several tenants are bound to the rent, if some have paid part, through this the

reddit[9] retinetur. Item à simili, si cui pasturam ad C. animalia dederim, licet donatorius C. non immittat, per unicā ovem immissam ad tantum numerum pasturā retinebit. Item liber homo à sciente se esse liberum hominē non possidetur, nec per ipsum acquiritur. Acquiritur tamen p ipsum, qui creditur esse servus, si mala fide possidetur liber homo, si non liber, sed servus alienus existimetur. Item p ꝑcuratorem & tutorem possessio nobis acquiritur, etiam nobis ignorantib[9]. Et si dicatur per eos nobis non acquiri, quæ nostro nomine accipiunt, futurum est, ut nec ipse possideat, s. ꝑcurator et tutor, cui res aliena sic tradita est, quia non habent animum possidendi, nec is q̃ tradidit, quia concessit possessionē, nec erit medio tempore vacua possessio. Acquiritur tamē minori, etiam si non cōsentiat, cùm plenæ ætatis extiterit. Et habebit versus ꝑcuratorem actionem negotiorum gestorum, si in tali contractu se malè gesserit, de majore autem non sic, ut suprà. Item acquiritur possessio & dñm per ꝑcuratorem & sine apprehensione, ut si quis ꝑcuratori suo tradi jusserit rem emptā, vel datam, etiam in ipsa jussione, quia per jussionem suam declarat voluntatem suam. Item si custodem in rem posuerit. Itē si claves cellulæ, vivariæ, vel horreorum tradiderit quis dño vel ꝑcuratori, vina et merces tradi videntur, & si ꝑcurator non erret & dñs erret, adhuc domino acquiritur possessio; & vice versa, si ꝑcurator erret & dñs non, acquiritur nihilominùs, sufficit enim si unus non erret,

Dig. XLI. t. ii. 1, § 20.

whole rent is retained. Likewise in a similar manner, if I have given to any one a pasture for a hundred animals, although the donatory has not sent in (to the pasture) a hundred, he will retain [his right] to pasture for such a number by sending in a single sheep. Likewise a free man is not possessed by one who knows that he is a free man, nor is any acquisition made through him. An acquisition however is made through him, who is believed to be a serf, if a free man is possessed in bad faith; if he is supposed to be not a free man, but another persons' serf. Possession is likewise acquired for us by an agent and by a guardian, even whilst we are ignorant. And if it be said that what they accept in our name is not acquired by them for us, it will result, that neither he, that is the agent or the guardian, to whom another persons' thing has been delivered, possesses it, because he had not the intention to possess it; nor he who has delivered it, because he has given up the possession, nor will the possession be vacant in the intermediate time. But [a thing] is acquired for a minor, even if he has not consented, when he has become of full age. And he will have against an agent an action in the case, if he has conducted himself ill in such contract, but as regards one of age not so, as above. Likewise possession and dominion are acquired through an agent and without [bodily] apprehension, as if a person should have ordered a thing bought [by him] or given to him to be given to his agent, even in the ordering itself, because by his ordering he declares his will. Likewise if he has placed a keeper over the thing. Likewise if any one has delivered the keys of his cellar, of his fish-stew, or of his barns to the lord or his agent, the wines and merchandise seem to have been delivered, and if the agent does not make a mistake and the lord makes a mistake, the possession is still acquired for the lord: and conversely if the agent makes a mistake and the lord not, nevertheless it is acquired, for it is sufficient if one of them does not err; it

secus esset, ut uterq, quia non consentit qui errat.
Dig. XLI. t. ii. l, § 5. Item quicquid p servum justè acquiritur, id dño acquiritur, sed ea, quæ ex maleficiis servus apprehenderit, ad dñi possessionem ideò nō pertinent, quia nec peculii causam apprehendunt. Item tradi potest possessio per
ib. § 20. ꝑcuratorem, sicut acquiri, & si quis per procuratorē tradi jusserit alicui, et ipse authoritate sua propria sine procuratore se posuerit in seysinā, quamvis vacuam, talis rectè per se in possessionem non veniet, quia posset donator ante traditionem revocare donationem, quod quidem post traditionem facere non posset. In pendenti igitur erit donatio, quousq, donator illam ratam habuerit, vel irritam tenuerit, tenebit tamen, si illam ratificaverit tacitè vel expressè, expressè, quòd hoc voluerit, tacitè, si illā in vita non revocaverit. Si autem amicus venditoris, cui mandavit, quòd donatorium[1] induceret in possessionem, donatore mortuo priusque[2] verus hæres id sciret (hæredibus non prohibentib⁹) donatoriū in possessionem induxerit, rectè tradita erit possessio. Sed si id fecerit, cùm sciret donatorem esse mortuum, vel cùm sciret quòd hæredes id facere nollent, non erit ritè facta traditio. Sed si hæredes hoc affectaverint, aliud erit. Itē dicit suprà in principio, cùm juris adminiculo, &c., q, nisi inᵛvene-
f. 44 b. rit juris adminiculū, nō videt quis possidere, licèt corpore & animo rei insistat, tamen ꝑpt rem quæ possideri nō potest, sicut res sacra & religiosa, quæ à nullo possideri potest, cùm tantùm sit in bonis Dei, nec ab ignorāte, nec à sciente, licèt possessor religionem contemnat. Item ꝑpter causam, quia liber homo à sciente

[1] "ut donatorium," MSS. Rawl. and Crewe.

[2] "priusquam inde sciret," MSS. Rawl. and Crewe.

would be otherwise if both erred, because he who errs does not consent. Likewise, whatever is rightfully acquired through a serf, is acquired for the lord, but those things which a serf has obtained by malfeasances, do not thereupon belong to the possession of the lord, because they do not possess the character of [a serf's] savings. Likewise possession may be given up by an agent, just as [it may be] acquired, and if a person has authorised a thing to be given up to any one by an agent, and the purchaser himself of his own authority without the agent has put himself into seysine, although it was vacant, such a person will not rightly come into possession by himself, because the donor may before delivery revoke the donation, which he could not do after delivery. The donation will therefore be in suspense, until the donor has ratified it, or has declared it null, but he will uphold it, if he has ratified it tacitly or expressly, expressly if he has so willed, tacitly if he has not revoked it in his lifetime. But if a friend of the vendor, to whom he has given a mandate to induct the donatory into possession, the donor having died before the true heir knew it, (the heirs not forbidding it,) has inducted the donatory into possession, the possession will have been rightly delivered. But if he did this, when he knew the donor to be dead, or when he knew that the heirs were unwilling to do it, the delivery will not have been duly made. But if the heirs have intended it, it will be otherwise. Likewise it is said above in the commencement, "with the support of right, &c.," that unless the support of right has intervened, a person does not appear f. 44 b.
to possess, although in body and in mind he stands upon a thing, nevertheless on account of a thing which may not be possessed, as being a sacred and religious thing, which cannot be possessed by any person, since it is exclusively amongst the goods of God, neither by a person ignorant, nor by a person with knowledge, although the possessor contemns religion. Likewise on

ipsum esse liberum nullo modo possideri potest, ab eo autem possideri potest, qui credit illum esse servum suum & non alienum. Item ab hostibus captus, non magis quàm servus, aliquid possidere potest, quia ab aliis possidetur, & unde, cùm nihil possidet, sequitur, quòd nihil dare potest nec transferre ad alium, nec facere accipientis cum effectu rem quam non habet, nec valet q agit, dum fuerit sub hostium potestate cōstitutus.

7. Si de una re pluribus facta sit donatio simul vel successive, quis præfertur.

Qualiter, & p quas personas possessio retineatur, satis dictum est suprà, sed restat videre, quid juris, si plurib⁹ de una et eadem re facta fuerit donatio, simul vel successivè, in eo, q superiùs, minùs dictum est. Ut, si quis unum primò feoffaverit, & chartam ei fecerit de feoffamento, & homagium suum ceperit, et in possessionem induxerit, sive talis usus fuerit, vel expletia ceperit sive non, si idem ille feoffator, cùm fuerit extra possessionem et nihil habeat, q ulteriùs tradere possit, nisi tantū servitium, vel servitium & homagium, cùm voluntate tenentis aliū feoffaverit, sicut primū, & in possessionē induxerit, et primū feoffatum ejecerit, uĩq; facit disseysinā tam donator quàm donatori⁹, et eodem modo, licèt ipsum primum non ejecerit, si secundò feoffat⁹ uti voluerit contra voluntatem primi, sive arando, sive seminādo vel aliud opus faciendo. Et idem erit, si primò feoffatum uti nō permiserit qualicunq; impedimēto, se dominum esse contendendo. Item non refert, cui primò facta sit donatio cum omnib⁹, quæ faciunt donationem, nec qui primò usus fuerit vel expletia ceperit, sed cui primò facta fuerit traditio. Itē refert, quis eorum primò habuerit seysi-

account of a cause, because a free man cannot be possessed in any way by a person who knows him to be free; but he may be possessed by a person, who believes him to be his own serf, and not [the serf] of another person. Likewise a person captured from the enemy no more than a serf can possess anything, because he is possessed by others, and hence since he possesses nothing, it follows that he can give nothing nor transfer [anything] to another, nor make any thing, which he does not possess, effectively [the property] of another, nor is anything which he does valid, whilst he is held under an enemy's power.

7. If a donation has been made of one thing to several persons together or successively, who is preferred.

In what ways and through what persons possession may be retained, has been sufficiently explained above, but it remains for us to see what right [there is], if a donation is made of one and the same thing to several persons, simultaneously or successively, which has been above less discussed. As if a person has enfeoffed one person first, and made for him a charter of enfeoffment, and taken his homage and inducted him into possession, whether such a person has used it or taken rents or not, if the same feoffor, when he was out of possession and had nothing which he could further deliver, except only service or service and homage, with the consent of the holder has enfeoffed another, just as the first, and has inducted him into possession, and he has ejected the first feoffee, the donor as well as the donatory certainly makes a disseysine, and in the same manner although he has not ejected the first, if he, who was enfeoffed in the second place, wishes to use it against the will of the first, either by ploughing or by sowing or by doing any work. And the same will result, if he has not permitted the first feoffee to use it by any kind of impediment, by contending that he is the lord. Likewise it does not matter, to whom the donation has been made in the first place with all things, which constitute a donation, nor who has first used it or taken rents, but to whom delivery was first made.

nam de voluntate & authoritate dñi per traditionem, vel se posuerit quis eorum in seysinā ꝑpria authoritate, et quo casu ille præfertur, qui authoritatem habet & traditionē. Item esto, q̄ quis teneñtum primò alicui tradiderit ad firmā & t̄minum annorum, & posteà alium de eodem teneñto feoffaverit, omnib⁹ concurrentib⁹, quæ faciunt donationem, et posteà illū in seysinā induxerit, firma erit donatio & bona, sine alicuj⁹ præjudicio, dum tamē firmarium uti & frui non impediat, quia benè sese cōpatiuntur de eadem re duæ possessiones, dum tamen ex diversis causis, sicut traditio ad firmā, & traditio in feodo ex causa donationis, quia usus fruct⁹ ꝑ se stare potest in ꝑsona uni⁹, & liberum teneñtum ꝑ se in persona alterius, & ille, qui habet t̄minum, nō habet nisi tantùm jus utendi fruendi in alieno teneñto, & sic sese benè cōpatiuntur istæ duæ traditiones, ad t̄minum & in feodo, & cùm donator ita ꝑ traditionē desierit esse dñs & possidere, & firmarium posteà de facto feoffaverit, firmarius per tale feoffamentū, licèt utatur & fruatur & in possessione sit, tamen donator causam suam possidendi ex tali donatione mutare non poterit, s. terminum in feodum, et unde, si firmarius ex tali feoffamento se gerat, ut dominus, facit disseysinam primo feoffato, & si per assisam amiserit, amittit utrumq̄, terminum & teñtum, quia gerendo se ut feoffatū videtur tacitè termino renun-
f. 45. ciare, & quod dicitur de duob⁹, dici poterit de pluribus, qui successivè fuerint feoffati. Plures tamen possunt simul & semel feoffari de eodem tenemento, & omnibus simul fieri poterit traditio, & erit una traditio & una donatio. Et quid, si primò feoffatus expletia capere non possit propter terminum usufructuarii, nihilominùs

Likewise it is of importance, who of them first had seysine with the consent and the authority of the lord by delivery, or who put himself first into seysine by his own authority, in which case he is preferred, who had authority and delivery. Likewise let it be that a person has first delivered a tenement to a certain person on lease to farm and for a term of years, and has afterwards enfeoffed another with the same tenement, with all concurrent circumstances which constitute a donation, and has afterwards inducted him into seysine, the donation will be firm and good without prejudice to any one; provided he does not impede the farmer in cultivating and in cropping, for the two possessions of the same thing are compatible, provided they are for different reasons, such as a delivery to farm, and a delivery in fee by reason of donation, for the usufruct may by itself be in one person, and the freehold by itself in another person, and he who has the term has nothing except the right of cultivating and cropping in another's freehold, and so those two deliveries are compatible, for a term and in fee; and when the donor has by delivery ceased to be the lord and the possessor, and has enfeoffed in fact the farmer afterwards, the farmer by such an enfeoffment, although he cultivates and crops and possesses, nevertheless the donor cannot change his reason of possession by such a gift, that is, his term into a fee, and hence if the farmer upon such an enfeoffment conducts himself as the lord, he works a disseysine to the first feoffee, and if he loses by an assise, he loses both the term and the tenement, because by conducting himself as the feoffee, he seems to renounce tacitly his term; and what is said of two persons, may be said f. 45. of several, who have been successively enfeoffed. Several persons however may be enfeoffed with the same tenement together and at the same time, and delivery may be made to all at the same time, and there will be one donation and one delivery. And what, if the person first enfeoffed cannot take profits on account of the term

valet donatio, quia semper salvari debet terminus. Et si secundus feoffatus, postquam se tenuerit ut feoffatus ad feoffamentum, & expletia ceperit, hoc erit potiùs de libero tenemento primi feoffati quam suo, quia de alieno. Et cum donator semel dederit, nihil sibi ulteriùs retinet, quod donare possit, nisi nudum dominium. Casus iste evenit apud Clarindone [1] in præsentia Johannis de Lexinton,[2] & malè fuit ibi terminatum, objecta quadam exceptione servitutis contra primo feoffatum, qui tulit assisam novæ disseys. contra secundò feoffatum & donatorem. Item si pluribus fiat donatio, possit quidē quibusdam fieri traditio in absentia aliorum, partim nomine proprio, partim nomine aliorum, s. nomine ꝑcuratorio, & sic acquiritur absentibus, de facto eoꝝ, qui præsentes sunt. Item, sicut fieri potest donatio pluribus ab uno de jure vel de facto; ita possunt plures donationem facere uni vel pluribus de re, quam tenent in communi, & erit donatio & traditio quasi una. Si autem non fuerit res communis, tunc refert quis fuerit in possessione ex quacunq; causa, sive jus habuerit sive non, & si talis donationem fecerit & traditionem, valebit donatio, licèt donator jus non habuerit, cùm possit quis rem dare alienam, & facta traditione, statim incipit donatorius possidere, & donator desinit. Et unde, si verus dominus eundem donatorium vel alium feoffaverit, & chartam fecerit & homagium ceperit, donatio non valebit, quia tradere non potest, cùm sit extra seysinā, id q̄ non habet, & quia feoffamentum, q̄ quis habet [3] ab aliquo ex una causa, illud ab alio habere non potest ex eadem causa, quia, q̄ semel meum est ex una causa & ab uno, du-

[1] "Clarendone," MS. Rawl.; "Barhantone," Crewe; "Clarhamdone," Glas.

[2] "Lexingtone," MS. Rawl.; "Bayntone," Crewe; "Leyntone," Glas.

[3] "quod quis habet." MS. Crewe omits all that follows "habet," down to "habebit dominus capita-"lis," p. 362. A folio may have been missing in the original MS. from which MS. Crewe was copied.

of an usufructuary, nevertheless the donation is valid, because the term may always be reserved. And if the second feoffee has afterwards held himself out as enfeoffed to the enfeoffment, and has taken rents, this will rather be from the freehold of the first feoffee, than from his own, because it is from another's. And when the donor has once given [a thing], he retains nothing further for himself, which he can give, except the nude dominion. That case happened at Clarendon in the presence of John de Lexington, and was badly determined there, an exception of serfage having been taken against the first feoffee, who brought an assise of novel disseysine against the second feoffee and the donor. Likewise if a donation be made to several persons, delivery may be made to some in the absence of the others, partly in their own name, partly in the name of others, that is, in their name as agents for them, and so acquisition is secured to the absent by the act of those, who are present. Likewise as a donation may be made to several [persons] by one [person] of right, or of fact, so several may make a donation to one or more of a thing, which they hold in common, and the donation and the delivery will be as it were one. But if it should not be a common thing, then it is of importance, who was in possession from whatsoever cause, whether he had the right or not, and if such a person has made a donation and a delivery, the donation will be valid, although the donor had not the right, since a person may give the thing of another, and upon delivery having been made, the donatory begins to possess and the donor ceases. And hence, if the true lord has enfeoffed the same donatory or another, and has made a deed and taken homage, the donation will not be valid, because he cannot deliver, since that, which he has not, is out of his seysine, and because the enfeoffment, which a person has from one person for one consideration, he cannot have from another for the same consideration, because that, which is once mine upon one consideration from one person, whilst my possession lasts, cannot be a

rante possessione mea, non poterit illud iterum esse meum ex eadem causa & ab alio. Nec magis poterunt duo unicā rem dare ex una causa vel diversis, nisi res fuerit communis, ut prædictum est, quàm unicam rem simul & insolidè[1] possidere, nec simul & insolidè[1] unicam rem possidere, non magis quàm un[2] stare, ubi alius stat, & unus sedere, ubi alius sedet,[2] & eisdem rationibus dare non potest, qui non possidet. Sed si quis jus habuerit in re aliena & non seysinā, poterit possidenti recognoscere possessionem esse jus possidentis, & remittere jus suum, vel simpliciter remittere sine recognitione. Poterit etiam, si dominus fuerit, ex nova concessione sive traditione (ut superiùs dict' est), mutare causam possessionis, ut si primò concesserit usū fructuum ad terminum, poterit concedere tenenti sine traditione ex nova causa libeř tenem̃. Si autem primò ad terminum vitæ & ut liberum tenemenť, poterit mutare causam usque in feodum, sed supervacuum esset omnino, si unus eandem rem uni bis traderet & ex eadem causa, cùm ex prima traditione omnino desierit possidere. Si quis autem in possessione fuerit alicujus rei propriæ vel alienæ, si ab eo petatur, potest illā recognoscere esse jus petentis, & omnino remittere vel tenendum de se & hæredibus suis, vel de alio, secundùm quod inferiùs dicitur, de finalibus concordiis.
f. 45 b. Item poterit quis desinere possidere, & alius incipere tam de facto ꝑprio, quàm de alieno. Item tam ex tempore quàm ex animo & corpore, ut infrà de assisa. Ex tēpore, vt si præsens fuerit, per negligentiam, & si absens, per oblivionem. Longa enim absentia, sicut decem annorum, vel ampliùs, inducit oblivionem.

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[1] "in solidum," MSS. Rawl. and Glas.

[2] "unus stare, nisi alius stat, et "unus sedere, nisi alius sedet," MSS. Rawl. and Glas.

second time mine upon the same consideration from another person. Nor can two persons give a single thing from one consideration or from different considerations, unless it be a thing common to them, as above said, any more than they can possess together the whole of one thing; nor can they possess together the whole of one thing any more than one can stand where the other stands, or one can sit where the other sits, and for the same reasons he cannot give, who does not possess. But if a person has a right in the realty of another and not the seysine, he may acknowledge to the possessor that possession is the right of the possessor, and release his own right, or simply release it without any acknowledgment. He may also, if he should be the lord, by a new grant or delivery (as above said), change the cause of possession, as if he has first granted the enjoyment of the fruits for a term, he may grant to the holder without delivery upon a new consideration the freehold. But if he has granted it first for the term of his life and as a freehold, he may change the consideration even to the fee, but it would be altogether superfluous, if one person should deliver the same thing twice over to one person, and on the same consideration, since after the first delivery he will have entirely ceased to possess. But if any one be in possession of any thing (which is) either his own or another's, if it be claimed from him, he may acknowledge it to be the right of the claimant, and altogether release it, either to be held of him and his heirs, or of another, according as it will be explained below [in treating] of final concordats. Likewise a person may cease to possess, and another begin to possess, as well by his own act, as by another's. Likewise on account of time, as well mentally and bodily as [will be explained] below concerning the assise. On account of time, as if he be present, from negligence, and if absent, from oblivion. For long absence, as for ten years or more, brings about oblivion. f. 45 b.

Cap. XIX.

1. Quibus modis amittitur possessio.

Quum autē semel fuerit possessio acquisita, amitti poterit multis modis; videndum igitur quibus modis amittatur, & scienđ est, q̄ eisdem modis amittitur, quibus acquiritur. Acquiritur non corpore tantū, sed utroq̄; animo tamen retineri poterit sine corpore, amitti tamen non poterit sine utroq̄, scil. animo & corpore, quia retinetur animo sine corpore, & corpore sine animo, & cùm utrumque defecerit, amittitur ex toto. Qualiter vero amissa contra voluntatem possidentis restituatur, satis dicetur infrà de assisa novæ disseysinæ.

2. Si ille, cui datum est, rem datam ulterius dare posset sine præjudicio, et cum quis poterit dare terram alienam, quare non potuit dare propriam.

Item videndum, an ille, cui datum est, rem donatam ulteriùs dare possit sine præjudicio dominorum capitalium, & videtur quòd sic, quia si ulteriùs fiat donatio, licèt capitalis dominus ex hoc damnum cōsequatur, tamen per hoc ei non injuriatur, quia non omne damnum inducit injuriam, sed è contra injuria damnum. Injuria autem dici poterit omne id, quod non jure fit, & ex injuria sequitur actio ad tollendum injuriam & id, quod injuria fit, sed ubi damnum & nulla injuria, non sequitur actio ad tollendum nocumentum, per quod fit damnum. Sed posset aliquis dicere, quòd ex hoc, quòd donatorius ulteriùs dat & transfert rem donatam ad alios, quòd hoc facere non potest, quia per hoc amittit dominus servitium suum, quod quidem non est verum, salva pace & reverentia capitalium dominorum. Et generaliter verum est, quòd donatorius rem & terram sibi datam donare poterit, cui voluerit, nisi ad hoc specialiter[1] agatur in possessione, ne possit.[2] Cùm enim quis tenementum dederit, certum dat tenementum

[1] "singulariter," MS. Glas. | [2] "ne possit," omitted MS. Glas.

Chapter XIX.

1. In what ways possession is lost.

When, however, possession has been once acquired, it may be lost in many ways: we must see, therefore, in what ways it may be lost, and it is to be known, that it is lost in the same ways in which it is acquired. It is acquired not with the body alone, but with both, but it may be retained with the mind without the body, but it cannot be lost without both, that is the mind and the body, because it is retained by the mind without the body, and by the body without the mind, and when both fail, it is lost altogether. But in what way, when lost against the will of the possessor, it may be restored, will be sufficiently explained below [in treating] of an assise of novel disseysine.

2. If he, to whom a thing has been given, may further give the thing given [to him] without prejudice, and when a man can give another's land, wherefore he cannot give his own.

Likewise it is to be seen whether he, to whom a thing has been given, may further give the thing given to him without prejudice to the chief lords, and it appears so, because if a donation be further made, although the chief lord suffers damage by it, nevertheless injury is not done to him, because all damage does not inflict injury, but on the contrary injury implies damage. But the term injury is applied to every thing which is done not rightfully, and upon injury there follows an action to remove the injury and that from which injury results, but where there is damage and no injury, an action does not follow to remove the nuisance, from which damage results. But some person may say, that from the fact, that the donatory further gives and transfers the thing given to others, that he cannot do this, because the lord through this loses his service, which is not true, with all due respect and reverence for the chief lords. And it is generally true, that a donatory may give to whom he pleases realty and land given to himself, unless it be specially provided in the possession, that he may not. For when a person has given a tenement, he gives a

tali modo, ut certas consuetudines recipiat & certum servitium, secundùm quod superiùs dictum est. Et unde de jure plus petere non poterit, si habuerit quod convenit, & sic tollit quod suum fuerit, & vadat. Non enim fit donatio tali modo, quòd habeat custodiam terræ & hæredis &[1] maritagium, sed quod habeat homagium & servitium, sed cùm homagium habuerit, & tale debeatur forinsecum servitium,[2] quod domino capitali, debeatur relevium, & custodia terræ, & maritagium hæredis cum evenerint, & quæ sequuntur, forinsecum sicut servitium domini regis, nunquam tamen habebit dominus capitalis ista simul, sed unum istorum tantùm, cùm evenerit, aut relevium, aut custodiam & hæredis maritagium. Et benè poterit esse, quòd unum istorum semper eveniet, & aliud nunquam: & unde si dominus tantùm relevium habeat, & teneat inde se
f. 46. contentum, quāvis plus valeant custodia & hæredis maritagium, & quia ubi quis tenetur ad duo sub disjūctione, unum solvendo vel faciendo liberatur, & unde, cū quis capitalis dominus tenentem suum impedierit, quod dare non possit, facit ei injuriam & disseysinam apertam, ex quo illum re sua & seysina uti non pmittit. Tenēs vero nullam facit injuriam domino suo ex tali donatione, quāvis damnū, cùm ipse dominus habere possit relevium de suo feoffato & ejus hæredibus, & licèt damnum ei facit, non tamen injuriosum erit prædicta ratione. Item videri potest, quòd capitalis domin[9] injuriam facit, ponendo se in seysinam in ipsa donatione tenentis sui recenter, vel post tempus, si hoc ei non liceat ex conventione. Quia esto, quòd, cùm ponere se voluerit in seysinam, repellatur, vel cùm in seysina fuerit, statim ejiciatur, unde ad hoc q ei competat actio de repetenda seysina, oportet dicere &

[1] "et," omitted MSS. Rawl. and Glas.

[2] "servitium," omitted MS. Rawl.

certain tenement in such a manner, that he may receive certain customs and a certain service, according as has been said above. And hence he cannot claim more of right, if he shall have had what is agreed upon, and so he takes what is his own, and goes away. For a donation is not made in such a manner, that he shall have the custody of the land and of the heir, and the maritage, but that he shall have homage and service, but when he has had homage, and such a forinsic service is due as to a chief lord, a relief and the custody of the land and the maritage of the heir are due when they should happen, and whatever things follow the forinsic service of our lord the king, but the chief lord never has all those at the same time, but one only when it shall happen, either relief or the custody and maritage of the heir. And it may well be, that one of those things will always happen, and another never, and hence, if the lord should have only a relief, he should keep himself content therewith, although the custody and maritage of the heir f. 46.
are worth more, and because when a person is bound to do two things disjunctively, he is freed by paying and doing one of them, and hence when a chief lord impedes his tenant that he may not give, he does him an injury and an overt disseysine, seeing that he does not permit him to use his own realty and seysine. But the tenant does no injury to his lord by such a donation, although [he does him] damage, since the lord might have a relief from his feoffee and his heirs, and although he does him damage, it will not be an injury for the reason above said. Likewise it may seem that the chief lord does an injury, by putting himself into seysine in the very donation of his tenant, recently or after a time, if this be not allowed him according to covenant. For suppose a case, that when he wished to put himself into seysine, he was repulsed, or when he was in seysine, he was forthwith ejected, hence for the purpose of showing that he has a right to an action to recover seysine, he ought to say

docere, quòd competit ei jus, & quòd facta sit ei injuria; unde cum repulsus fuerit sine seysina habita, non video, quòd competat aliqua actio, per quam acquirere possit seysinam suam, quam nunquam habuit, vel seysinam alicujus antecessoris, vel cum ejectus fuerit, liberum tenementum recuperare non poterit p assisam, liberum tenementum quod non habuit. Si autem summoneri fecerit donatorium, quare feodum suum intravit, respondere poterit, & docere rationem & causā, quare; scil. quia ille, cujus tenementum illud fuit, & liberè tenuit, sine aliqua exceptione & servitute imposita, illum inde feoffavit p chartam suam, quam statim ostendat, si velit. Si autem quo warranto? producat statim incontinenti feoffatorem suum si præsens fuerit, qui warrantizet, vel ostendat chartam suam de feoffamento. Si autem quærat, quare intravit feodum suum sine licentia sua, & ad damnum suum, tale videlicet, q amittit servitium suum & hæredis maritagium & custodiam terræ, respondere poterit & (ut priùs) ostendere poterit donatorius causam, quare; & quòd si damnum habuerit, illud non est ei injuriosum, quia injuria non sequitur omne damnum. Habet enim ex tenemento illo, quicquid pertinet ad dominum feodi ratione homagii & servitii, licèt non ad tale commoď, quando tenens suus in manu sua tenuit tenementum, sicut custodiam terræ, & hæredis maritagium, sufficit enim si habeat relevium, quasi ex duobus alteř. Aliud tamen esset, si in ipsa donatione esset talis servitus adjecta, ne tenens omnino alienaret, vel ne certis personis, & quo casu, si fieret alienatio contra conventionem & mod donationis, & donatio fiat tūc, cùm fuerint simul in possessione donator & donatorius, quo casu, si capitalis domin^{9} donatorium ejecerit, non recuperabit donatorius

and to show that he has the right, and that an injury has been done to him; wherefore, when he has been repulsed without having obtained seysine, I do not see that he is entitled to any action, by which he can obtain his seysine, which he has never had, or seysine of any ancestor, or when he has been ejected, he will not be able to recover a free tenement by an assise, since he never had a free tenement. But if he causes the donor to be summoned [to show] why he has entered on his fief, he may answer and show reason and cause why; for instance, because he, whose tenement it was, and who held it freely without any exception or service imposed upon it, enfeoffed him therewith by his deed, which he can show forthwith, if he chooses. But if he proceeds under a quo warranto? let him produce forthwith without delay his feoffor, if he be present, who can warrant him, or let him show his deed of enfeoffment. But if he demands, why he entered his fief without his license and to his damage, in such way for instance that he has lost his service, and the maritage of the heir and the custody of the land, the donatory will be able to answer and as before to show cause why: and that if damage has accrued to him, it is not injurious to him, because injury does not attend all damage. For he has from that tenement whatever belongs to the lord of the fief by reason of homage and of service, although not for such advantage, as when his tenant had the tenement in his own hand, such as the custody of the land and the maritage of the heir, for it is sufficient if he have a relief, as one out of two. For it would be otherwise, if in the donation itself such a servitude had been added, that the tenant should not under any circumstance alienate, or not to certain persons, and in which case, if an alienation be made against the agreement and mode of donation, and the donation be made then, when both the donor and the donatory were together in possession, in which case, if the chief lord has ejected the donatory, the donatory shall not recover by an assise,

per assisam, quia possidere non incipit, ex quo donator possidere non desinit. Si autem donatorem ejecerit, competit ei assisa, ex quo nunquam à possessione recessit. Eodem modo fiet, si donator ejecerit per se ante traditionem. Si autem solum donatorium in possessione invenerit post traditionem, & ipsum statim & recenter ejecerit, per assisam non recuperabit eject^{9}, quia quamvis statim habeat liberum tenementum, quantum ad suum feoffatorē & alios, qui jus non habent, tamen non quantum ad capitalem dominum, propter modum & conventionem in donatione appositam, non
f. 46 b. nisi ante tempus, id est, post longam & pacificam possessionem, & quo casu iniquum esset, q̄ possessio cum eo capitali domino remaneret, nisi hoc haberet ex conventione. Ideò parat^{9} esse debet dominus capitalis restituendi possessionem suo feoffato, nisi fortè dare voluerit valorem vel precium, & maximè si donator hoc affirmaverit, vel quantum donatorius dare voluit, si tenementum ex causa emptionis acquisivit. Si autem capitalis dominus præsens per longum temp^{9} dissimulaverit, donatorium ejicere non potest, quin recuperet; habebit tamen actionem ex conventione versus tenentem suum, qui alienavit, & non aliū, sive solvendo sit, sive non. Et unde si nihil habeat capitalis dominus, sibi ipsi imputari possit, q̄ donationem contra conventionem factam p̄ tantū temp^{9} dissimulaverit. Videtur igitur ex p̄missis, q̄, cùm donatio facta à domino tenenti suo perfecta sit & libera, pura & non cōditionalis nec servilis, ex hoc non fit domino injuria, si tenens ulteriùs dederit; ex hoc enim provenit injuria, si contra modum vel conventionem. Si tenens meus fecerit donationem, quæritur, cui faciat injuriam, non domino,

because he does not begin to possess, since the donor does not cease to possess. But if he has ejected the donor, the latter has a right to an assise, since he has never withdrawn from possession. It will be done in the same way, if the donor has ejected him before delivery. But if he has found the donatory alone in possession after delivery, and has ejected him forthwith and recently, the party ejected shall not recover by an assise, because although he has forthwith the freehold as regards his feoffor and others who have no right, yet [he has it not] as regards the chief lord on account of the mode and covenant attached to the donation, not until a time has elapsed, that is after a long and peaceable possession, f. 46 b.
and in which case it would be inequitable that the possession should remain with the chief lord, unless he has it by a covenant. Hence the chief lord ought to be prepared to restore possession to his feoffee, unless by chance he is willing to give him the value or the price, and chiefly if the donor has affirmed this, or as much as the donatory has been willing to give, if he has acquired the tenement by way of purchase. But if the chief lord, present during a long time, has dissembled, he cannot eject the donatory, so as to prevent him recovering, he will have however a right of action on the covenant against his tenant, who has alienated, and not against any other, whether he is able to pay or not. And hence if the chief lord has nothing, it must be imputed to himself, that he has dissembled for so long a time [his knowledge of] a donation made against a covenant. It appears therefore from the premises, that when a donation by a lord to his tenant, is perfect and free, absolute and not conditional nor servile, no injury is done to the lord from the fact, if the tenant has further given it, for injury results from the fact, if [he has done so] against a mode or a covenant. If my tenant has made a donation, it is asked to whom he has done an injury, not to the lord, for the lord has whatever belongs to

quia dominus habet, quicquid pertinet ad ipsum & tenementum obligatum & oneratum, quicquid dicatur, & ad quemcunq; pervenerit. Item nec feoffatus, quia nihil ad capitalem dominum, quicunque feodum suum tenuerit, cùm tenens sit tenens suus, quamvis per medium. Item si dicat, quod injustè ingressus est feodum suum, dico non, quia non est feodum suum in dominico sed tenentis illius, & dominus nihil habet in feodo, nisi servitium; & sic erit feodum tenentis in dominico, & feodum domini in servitio, & si dominus prohibuerit, ne tenens faciat voluntatem suam de tenemento suo, quod tenet in dominico, sic intrat dominus in tenementum tenentis sui & facit ei disseysinam, nisi modus vel conventio in ipsa donatione adjecta aliud inducat, cū quilibet possit modum & conditionem in donatione sua apponere, & legem, quæ semper observabitur; feodum vero domini dictum est id, homagium & servitium, & non tenementum in dominico, & ideò qui intrat in homagium & servitium suum facit ei injuriam, & nō, qui intrat in tenementum, quod tenens suus tenet in dominico, ut suprà dictum est.

3. Quæ sit donatio libera, et quæ conditionalis.

Et unde necessarium est videre, quæ donatio est libera & pura, & quæ conditionalis (secundum quod superiùs dictum est), & quæ servituti supposita, videlicet, quod donatorius faciat, vel ne ei facere liceat; de hoc autem quod dicitur libera, oportet videre quid sit libertas, quid servitus, ut sciri poterit quid inde sequatur; quid autem sit dare, satis dictum est suprà.

4. Quid sit libertas, et quid servitus. Inst. I. iii. § 1.

Est autē libertas, naturalis facultas ejus, quod cuique facere libet, quod voluerit, nisi quod de jure vel vi prohibetur. Servitus autem dici poterit contrarium, ut si contra libertatem teneatur quis ex conventione aliquid facere, vel non faciat, cùm igitur donatio pura

himself and the tenement charged and burdened, whatever may be said and to whomsoever it may have come. Likewise neither the feoffee, for it matters not to the chief lord, whosoever has his fee, since the tenant is his tenant, although through an intermediate tenant. And if he shall say, that he has entered his fee unjustly, I say not so, because the fee is not his in the domain, but is his tenant's, and the lord has nothing in the fee, except a service; and so the tenant will have the fee in the domain, and the lord will have the fee in the service; and if the lord shall prohibit his tenant to work his pleasure with the tenement, which he holds in domain, the lord so enters into the tenement of his tenant and causes him a disseysine, unless a mode or covenant added in the donation itself induces otherwise, since any one may add in a donation a mode or covenant, and a law, which shall be always observed. But the fee of the lord is said to be this, homage and service and not the tenement in domain, and therefore he who enters upon the homage and his service does him an injury, and not he who enters upon the tenement, which his tenant holds in domain, as above said.

3. What donation is free, and what is conditional.

And hence it is necessary to see, what donation is free, and what is conditional (according to what has been said above), and what is subject to a service, for instance, what the donatory should do, and what he is not allowed to do; but concerning this, which is termed "free," we must see what is freedom, what is servitude, that it may be known, what thereupon follows, but what constitutes giving, has been sufficiently explained above.

4. What is freedom, and what is servitude.

Freedom is the natural faculty of doing what each person pleases to do according to his will, except what is prohibited to him of right or by force. Servitude on the other hand may be said to be the contrary, as if any person contrary to freedom should be bound upon a covenant to do something, or not to do it. When therefore

sit & perfecta sine conditione vel servitute imposita, dici possit libera, & cum donatio rem faciat accipientis, & fit libera, & ex libertate sequatur, quòd donatorius de re data facere possit, quod voluerit, si rem ulteriùs dederit, domino suo non injuriatur, cùm totum habuerit quod ad ipsum pertinuerit. Item poterit donatio esse subjecta conditioni, vel servituti in parte, vel in
f. 47. toto: item quantum ad omnes, vel quantum ad quosdam, conditioni, secundùm quod superiùs in parte dictum est. Ut si dicatur, Do tibi tali tantum terræ, si navis venerit ex Asia, vel comes Richardus effectus fuerit rex Alemannū,[1] vel si hoc fecerit vel non fecerit, talis donatio perfecta non erit, donec ita sit vel non sit, cū dependeat ex insidiis fortunæ, & existente conditione, perfecta erit donatio facta traditione, quæ si non fiat, habebit donatorius actionem ex conventione.

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[1] "vel comes Ricardus effectus "fuerit rex Alemannorum," MS. Rawl.; "vel si comes Ricardus ef- "fectus fuerit rex Alemanniæ," MS. Glas.; "vel comes Ricardus "fuerit rex Alemannïæ," MS. Gal.; "vel comes Ricardus fuerit "rex Almaniæ," MS. Crewe. This is a crucial passage for determining the date of the writing of Bracton's work. Richard, earl of Cornwall, was elected king of the Romans 13 Jan. 1257, but was not crowned emperor before May 1257. It has been suggested by some commentators, that this passage was written in the interval between those two events, and that the word "effectus" refers to the ratification of Richard's election by his subsequent coronation. Others consider it to refer to his election, which did not take place until some time after the death of William, count of Holland, during which time negotiations were carried on with the electors of the empire, and the success of these negotiations was doubtful. Earl Richard's coronation, however, was forcibly opposed in the interval between January 1257 and May 1257, so that it may have been for some time uncertain whether his election would be effective, and this may have been the condition contemplated in the passage.

a donation is absolute and perfect without any condition or servitude imposed upon it, it may be styled free, and since a donation makes a thing the acceptor's, and it is free, and it follows from its freedom, that the donatory may do with the thing given what he wills, if he gives the thing further, no injury is done to the lord, since he has the whole, which belongs to him. Likewise the donation may be subject to a condition or to a servitude in part or in whole: likewise to a condition as regards all persons, or as regards some individuals according as to f. 47.
what has been said in part above. As if it be said, I give to you such a one so much land, if a ship shall have come from Asia, or count Richard [1] shall have been made king of the Germans, or if he shall have done this or shall not have done this, such a donation will not be perfect, until either it be so or be not so, since it depends on the snares of fortune, and when the condition happens, the donation will be perfect on delivery being made, which if it be not made, the donatory will have an

[1] Richard, earl of Cornwall, brother of king Henry III., was elected king of the Germans in succession to William, count of Holland, on 13th January 1257. He was the immediate predecessor of Rudolph of Hapsburgh, who succeeded him in 1273. Comes Ricardus is mentioned elsewhere in folio 288 b, "ut si quis interrogat quis "fuit ad consilium London, et re- "spondeat quis, quod rex et comes "Ricardus (ut credit), licet aliter "sit in veritate, quod comes ibi non "fuerit." The council here referred to is probably the Great Council of the magnates and viscounts summoned to meet the king at Westminster in the fortnight immediately after Easter, 1254, to grant the king an aid for an expedition to Gascony against the king of Castile. A writ of summons was issued from Windsor on the eleventh of February, which is attested by the Queen and Richard earl of Cornwall (Report on the Dignity of a Peer, App. I. p. 13). But it appears that the council or parliament waited in vain during three weeks the arrival of earl Richard (Math. Paris, p. 334, vol. iii., Rolls edition). The reference to the absence of earl Richard from the council is conclusive, that the passage in Bracton, f. 288 b., was written after Easter, 1254. It appears from the Chronicle of Matthew Paris, that earl Richard arrived from the continent some time after the parliament had separated.

Et idem erit si fiat mentio de hæredibus. Si autem sic dicatur, Do tali & hæredibus suis sub tali conditione, quæ dependeat ex futuro, videlicet ut conditio referatur ad donatorium & hæredes suos simul, vèl tantùm ad hæredes, & non ad donatorium, tunc ad hoc quòd donatorius liberum habeat tenementum in futuro, existente conditione vel feodo; refert utrum dicatur, tali & hæredibus suis conjunctim, vel tali & hæredibus suis divisim, videlicet, ut conditio referatur ad donatorium & hæredes suos simul, vel tantū ad hæredes & non ad donatorium. Si autem conjunctim, non erit alicujus istorum liberum tenementum, nec perfecta donatio. Si autem divisim, statim perfecta erit donatio & liberum tenementum donatorii, sed non quātum ad hæredes erit feodum, antequam existat conditio. Idem erit, si dicat, Do tali & hæredibus suis, si hæredes habuerit de corpore suo, vel si quos, &c., statim erit liberum tenementum donatorii, sed nunquam feodum, nisi cùm tales habuerit, propter conditionem, quæ dependet ex fortuna, ex pendenti & eventu dubio. Si autem sic dicatur, Do tali & hæredibus suis, vel tali & hæredibus suis de corpore suo procreatis, vel quos de corpore suo, &c., statim erit perfecta donatio, & feodum donatorio, licèt in fine addatur talis conditio, quòd si tales non extiterint, vel si extiterint & defecerint, quòd terra revertatur ad donatorem, nihilominùs perfecta erit donatio ab initio, facta traditione, sed resolvitur sub tali conditione, quæ quidem tacita esse possit, sicut expressa, & de necessitate revertitur res data ad donatorem propter defectum hæredum, cùm non extiterint, vel si extiterint & defecerint. Item si

action upon the contract. And the same thing will happen, if mention be made of heirs. But if it be said thus, I give to such an one and his heirs under such a condition, which depends upon the future, for instance if the condition refers to the donatory and his heirs together, or only to the heirs and not to the donatory, then for the purpose that the donatory should have a freehold in the future, the condition happening or the fee, it is of importance whether it be said, to such an one and his heirs conjointly, or to such an one and his heirs separately, for instance that the condition should be referable to the donatory and his heirs together, or to the heirs only and not to the donatory. But if conjointly, it will not be the freehold of any one of them, nor will the donation be perfect. But if separately, then the donation will be perfect forthwith, and the freehold will be the donatory's, but the fee will not vest as regards the heirs, until the condition happen. The same thing will result, if he says, I give to such an one and his heirs, if he shall have heirs of his body or if others, &c., the freehold will become the donatory's forthwith, but the fee never, except when he has such heirs, on account of a condition which depends on fortune, upon a pending and doubtful event. But if it be so said, I give to such an one and his heirs, or to such an one and the heirs begotten of his body or whom of his body, &c., the donation will be perfect forthwith, and the fee [will pass] to the donatory, although at the end there be added such a condition, but if such [heirs] are not born, or if they have been born and they have died, the land shall revert to the donor, nevertheless the donation will be perfect from the commencement, if delivery has been made, but it is cancelled under such a condition, which may be tacit as well as express, and the thing given of necessity reverts to the donor from failure of heirs, if they have not been born, or if they have been born and have failed. Likewise if a donation be made to

certis hæredibus fiat donatio, licèt defecerint, & alii remotiores generaliter admittuntur ad successionem ex conditione, ut si dicatur, Do tali & hæredibus suis, si hæredes habuerit de corpore suo, si tales habuerit, licèt defecerint, alii remotiores vocantur ad successionem, sed semper erit liberum tenementum, & non feodum, quousque tales esse inceperint, & si tales nunquam procreati fuerint, omnes hæredes remotiores excluduntur, quasi non existente conditione, & semper erit liberum tenementum donatorii & nunquam feodum. Item quandoque obligatur persona donatorii ex ipsa donatione, & quandoque tam donatorius quàm ipsa res; donatorius, ut si dicat donator, Do tibi talem rem, ut invenias mihi necessaria, ex hoc obligatur donatorius & non ipsa res, & ex tali donatione non obligatur ipsa res, sed donatorius, ad necessaria invenienda. Si autem sic dicat, quòd invenias sibi necessaria ex re data, ex tali donatione obligatur tam ipsa res, quàm persona, scilicet res, non ut donator rem possit repetere, sed ut ex re data sibi inveniantur necessaria. Item eodem
f. 47 b. modo, si in ipsa donatione convenerit inter donatorem & donatorium, nē donatorius faciat, & fecerit, adhuc rem donatam revocare non poterit, agere tamen potest ex conventione ad consequend tantùm suum interesse. Item si ulteriùs procedatur in obligationē, ut si non fiat, ut convenerit, vel contra hoc q convenit q fieret, vel non fieret, quòd benè liceat donatori & hæredibus suis ponere se in rem datam, tenend sibi & hæredibus suis ut priùs, vel ad vitam, sic obligatur tam res quàm

certain heirs, although they have failed, others more remote are generally admitted to the succession according to the condition, as if it be said, I give to such an one and his heirs, if he has heirs of his body, if he should have had such heirs, although they should fail, others more remote are called to the succession, but it will always be a freehold, but not an estate in fee, until such heirs have been procreated, and if such heirs should be never procreated, all the more remote heirs are excluded, as if the condition had not happened, and it will always be a freehold of the donatory's, but not an estate in fee. Likewise the person of the donatory is sometimes obliged under the donation itself, and sometimes the donatory and the thing itself; the donatory [for instance], as if the donor should say, I give you such a thing, that you may find me with necessaries, upon this the donatory and not the thing itself is charged with the obligation, and by such a donation the thing itself is not charged, but the donatory [is bound] to find necessaries. But if he shall so say, that you shall find for him necessaries out of the thing given, by such a donation the thing itself as well as the person [of the donatory] is charged, that is the thing itself, not that the donor may reclaim it, but that necessaries may be found for him out of the thing given. Likewise in the same way, if it has been agreed in the donation itself between the donor and the donatory, that f 47 b.
the donatory shall not do [a thing], and the donor does it, he still cannot reclaim the thing, but he may bring an action on the covenant to obtain only his own interest. Likewise if it be proceeded further with an obligation, that if it shall not be done, as it has been agreed, or contrary to what it has been agreed that it should be done, or not done, that it may well be lawful for the donatory and his heirs to put himself into the thing given, to be held by himself and his heirs as before or for life, the thing as well as the donatory is obliged, and in which

donatorius, & quo casu, si donator se posuerit in seysinam per conventionem, & donatorius petat per assisam, obstabit ei exceptio conventionis. Si autem in seysinam se ponere non possit donator, habebit actionē ex conventione, ad seysinam recuperandam. Item si dicatur sic, Do tibi talem rem, habendam tibi & hæredibus tuis, vel cuicunque dare vel assignare volueris, exceptis viris religiosis & Judæis, obligatur sic tam res quàm psona; res, ne detur talibus, persona, ne det talibus, & sic non erit libera donatio, quoad personas vetitas, quia prohibitum, ne faciat, libera autem quoad oñs alias personas. Et sive donatorius rem datam retinuerit, vel illam ulteriùs dederit, non credo, quòd donator ex tali obligatione rem datam possit repetere, sed ex conventione agere, ad suum interesse, nisi ita convenerit, quòd si contra præmissa factum fuerit, possit donator se ponere in seysinā, ad quoscunque res illa postmodum pervenerit contra vetitum. Et quo casu, si donatorius rem datam ulteriùs dederit liberè, omnino nullius persona excepta, tamen adhuc erit res obligata, quòd dare non possit; quia transit cum suo onere. Et si primus donator, ex conventione inter ipsum & suum feoffatū, se posuerit in seysinam, & ultimò feoffatum ejecerit, ei, petenti restitutionem per assisam, obstabit exceptio conventionis, licèt secundus donatorius obligatus non sit ex conventione inter alios facta, & licèt ipse non teneatur, tenetur tamen, ex quo detinet rem obligatam; & licèt ejectus fuerit & extra seysinam, habebit tamen regressum ad excambium versus suum feoffatorem, quia

case if the donor puts himself into seysine through the covenant, and the donatory claims through an assise, the exception of the covenant will be in his way. But if the donor cannot put himself into seysine, he will have an action upon the agreement to recover seysine. Likewise, if it be said thus, I give you such a thing to have to yourself and your heirs, or to whomsoever you wish to give or to assign it, except to persons under religious vows or to Jews, the thing as well as the person is under obligation: the thing that it shall not be given to such persons, the person that he shall not give it to such persons, and so the donation will not be free as regards the forbidden persons, because it is prohibited not to do it, but will be free as regards other persons. And whether the donatory has retained the thing given, or has given it further, I do not believe that the donor upon such an obligation can reclaim the thing given, but he may bring an action for his own interest, unless it has been thus agreed, that if it has been done contrary to the premises, the donor may put himself into seysine, into whomsoever's hands that realty may have afterwards come contrary to the prohibition. And in which case, if the donatory has further given the realty freely, without an exception against any person whatever, nevertheless the thing will still be burdened, that he cannot give it, for it passes with its burden. And if the first donor upon a covenant between himself and his feoffee has put himself into seysine, and has ejected the last feoffee, the exception of the covenant will be in the way of his claiming restitution by an assise, although the second donatory be not obliged by a covenant made between other parties, and although he personally is not bound, he is bound nevertheless from the time, when he detains a thing which is bound; and although he has been ejected and put out of seysine, he will have however a re-entry for compensation against his feoffor, be-

tenetur ei suus feoffator facere, quod promisit, promisit enim in sua donatione, rem esse liberam, quam ex postfacto invenit oneratam. Si autem donator ingredi non possit, secundùm quod in donatione convenit, habebit actionem ex conventione versus utrumque, tam contra secundum donatorium, quàm ab eo feoffatum, quia donatorius tenetur ex conventione obligatus, & suus feoffatus tenetur; quia rem detinet obligatam, & nullus eorum per se; donatorius non, quia non potest restituere, licèt teneatur ex conventione, nec feoffatus ab eo, quia non tenetur ex conventione, licèt possit restituere. Facta igitur conventione, utriusq; procedat actio simul contra utrumque, & quo casu, cùm primus feoffator obtinuerit, faciat secundus excambium suo feoffato. Itē poterit fieri donatio cum tali modo, ne res detur alicui, præterquam ipsi donatori, & qualiter fieri debeat in hoc casu, satis elici poterit ex præmissis. Item fieri poterit donatio, ne cui detur à donatorio vel hæredibus suis, & sic non erit donatio libera, cùm sit servituti supposita. Et unde si dicatur generaliter tenēdum liberè, detrahitur tamen libertati per adjectionē, quæ sequitur, ne det, & nihilominùs obligatur res cum psona. Itē poterit fieri donatio ne
f. 48. fiat, i. ne donatorius det rem sibi datā, vel eam conferat, si mobilis sit, vel ea utatur vel fruatur, si immobilis, & si hoc dici debeat donatio, inutilis erit omnino & infructuosa, licèt interveniat traditio, quia non fit accipientis, & ideò potiùs dicenda est nulla. Item dari poterit terra liberiùs, quàm ipse tenuit, qui

cause his feoffor is bound to him to do what he has undertaken, for he has undertaken in his donation that the thing is free, which he has found after the event to be burdened. But if the donor cannot enter, according to what is agreed upon in the donation, he will have an action upon the covenant against each, as well against the second donatory as against his own feoffee, because the donatory is held bound under the covenant, and his own feoffee is held bound; because he detains a thing which is burdened, and none of them is by himself bound; not the donatory, because he cannot restore it, although he is bound by the covenant; nor his feoffee, because he is not bound by the covenant, although he should be able to restore it. If there be therefore a covenant, the action of each may proceed simultaneously against each, and in which case, when the first feoffor has gained, let the second make compensation to his feoffee. Likewise a donation may be made in this manner, that a thing may not be given to any body except to the donor, and in what way it ought to be done in this case, may be sufficiently understood from the premises. Likewise a donation may be made, that it may not be given by the donatory or his heirs to any body, and so the donation will not be free, since it is subject to a service. And hence if it be said "to be "held freely," the freedom is detracted from by the addition which follows, that he may not give, and nevertheless the thing is bound with the person. Likewise a donation may be made, that a thing may not be done, that is, that the donatory may not give the thing given f. 48. to him, nor confer it, if it be moveable, nor use nor enjoy the fruits, if it be immoveable, and if this is to be called a donation, it will be unprofitable and altogether without fruit, although delivery intervene, because it does not become the acceptor's and therefore is rather to be declared null. Likewise, land may be given more freely

dedit, & tamen quia res transit cum suo onere, semper manet obligata primo feoffatori. Item per majus servitium, & per hoc primus feoffator nullū commodum consequitur, nisi in casu, ut si fortè homagium sui tenentis ei acciderit, ut eschaeta, vel ꝑ defectu hæredis, vel ꝑ felonia, vel ratione custodiæ vel hujusmodi. Item q quis tenet per servitium militare, dare poterit tenend in socagio, & è contra; benè enim poterit tenens alicujus mutare feoffamentum & servitium, quantum ad ipsum & tenentem suum, & ita q ei non competat custodia, nec hæredis, tenentis sui, maritagium, quamvis hæc omnia competant suo feoffatori. Et quid si pro defectu hæredis vel ꝑpter feloniam vel alio modo eveniat, quòd ultimò feoffatus tenere debeat de primo feoffatore? cum ratione sui feoffamenti per servitium militare competat ei custodia & maritagium hæredis, & de feoffamento tenentis sui super socagium, & de natura socagii non competat ei pro relevio, nisi redditus duplicatus, solvat hoc si poterit diligens & providus curialis. Item cùm quis liberiùs dederit quàm tenuerit, tenetur feoffatum suum warrantizare, & defendere per servitium in chartâ nominatum, q si facere noluerit, vel non possit, dominus capitalis se capiat ad feodum suum, quia res transit cum onere, & tenens faciat servitium statim, donec habere possit regressum versus suum warrantum. Item dari poterit res liberiùs, quàm donator illā tenuerit, ut si teneatur de domino suo ad certum servitium, & ipse dederit in liberam, puram & perpetuam eleemosinam, vel in liberum maritagium, & cum res transeat cum onere, ꝑpter mod donationis suæ tenetur feoffatum suum in seysina defendere. Et quid

than the giver himself held it, and nevertheless, since the thing passes with its burden, it always remains charged to the first feoffor. Likewise by a greater service, and through this the first feoffor gains no advantage, except in case that by chance the homage of his tenant shall fall to him, as an escheat, either from failure of an heir, or through felony, or by reason of custody or such like. Likewise what a person holds by military service, he may give in sockage, and the contrary, for the tenant of any one may well change the feoffment and the service, as far as regards himself and his tenant, and so that the custody shall not belong to him, nor the maritage of the heir of his tenant, although all these belong to his own feoffor. And what, if from failure of heirs or on account of felony or in any other way it happens, that the last feoffee ought to hold of the first feoffor ? Since by reason of his own feoffment for military service the custody and the maritage of the heir belongs to him, and from the feoffment of his tenant upon sockage and from the nature of sockage there does not belong to him by way of a relief any thing except a double rent, let a diligent and provident officer of the court solve this question if he can. Likewise when a man has given a thing more freely than he has received it, he is bound to warrant his feoffee and to defend him by the service named in the deed, which if he be unwilling to do or cannot do, let the chief lord betake himself immediately to his fee, because a thing passes with its burden, and let the tenant forthwith perform the service, until he can have recourse against his warrantor. Likewise a thing may be given more freely than the donor held it, as if it be held of its lord for a certain service, and the tenant gives it in free, absolute, and perpetual alms, or in free maritage, and since the thing passes with its burden, on account of the mode of the donation he is bound to defend his tenant in the seysine. And what if the donor

si donator contrarius sit sibi ipsi in donatione sua, ut si dicat, Do tibi talem rem in liberam, purā, & perpetuam eleemosinam, faciendo inde tale servitium, & quo casu, libera & pura non potuit esse eleemosina, cùm sit servitio obligata. Videtur igitur, (sine p̃judicio melioris sententiæ,) q̃ contra donatorium debeat interpretari, ex quo scienter in charta sua voluit ad servitiū obligari. Item si dicat donator, Do tibi talem rem, habendā & tenendā in libeř maritagiū cum tali, faciendo inde tale servitium, ista duo simul stare nō possunt, q̃ res data sit in liberum maritagiū, & q̃ inde fiat homagium & servitium ante tertiū hæredē inclusivum, & unde, si statim fiat homag' vel ante tertiū hæredem quandocunq;, homagium sequitur servitium, & sic p̃ homagio erit interpretand'. Item, si sic convenerit inter donatorem & donatorium, ne fiat donatio vel vēditio, nisi tantùm donatori, vel ejus hæredi, & si contra factum fuerit, statim post traditionem poterit donator se ponere in seysinā, cùm res ex conventione maneat obligata, post tempus verò non potest, quin faciat disseysinam; negligentia enim trahitur ad consensum. Si autem ab initio convenerit, q̃ se in seysinam ponere possit, tum multò fortiùs, dum tamen incontinenti. Si autem sic convenerit, quòd se ponere
f. 48 b. posset in seysinam cùm voluerit, & quando voluerit, omni tempore se ponere possit, cùm non currat tempus contra ipsum, eò q̃ res est taliter obligata, & ille ultimò feoffatus sibi imputare poterit, q̃ rem sic obligatam ex donatione accepit, sive hoc fecerit ignoranter vel scienter, scit autem (vel scire debet) quilibet, qui contrahit, quæ vel qualiter sit res, quam accepit, libera vel serva, onerata vel non onerata, obligata vel non, vitiosa

be self-contradictory in his donation, as if he shall say, I give you such a thing in free, absolute, and perpetual alms, upon doing thereon such a service, and in which case the alms cannot be free and absolute, since they are charged with a service. It seems (without prejudice to a better decision) that it ought to be interpreted against the donatory, since he has knowingly been willing to be bound in the deed to the service. Likewise if the donor should say, I give you such a thing, to have and to hold in free maritage with such a one, on doing thereupon such a service, those two things cannot stand together, because the thing is given in free maritage, and because thereupon homage and service is done before the third heir inclusively, and hence if homage be done forthwith or before the third heir at any time, service follows homage, and so it will have to be interpreted as homage. Likewise if it has been so agreed upon between the donor and the donatory, that there shall be no donation nor sale except to the donor or his heir, and if it be done otherwise, the donor may forthwith after the delivery put himself into seysine, since the thing remains under the covenant charged, but after a time he cannot, without making a disseysine, for negligence is drawn into consent. But if he has agreed from the beginning that he put himself into seysine, then much more so, provided however it be forthwith. But if he has so agreed, that he can put himself into seysine, when he chooses, and when he wishes, he can at any time put f. 48 b.
himself into it, since time does not run against him, because the thing is charged in that manner, and the last feoffee may blame himself, that he has received by donation a thing so charged, whether he has done it ignorantly or knowingly; but every body, who contracts, knows or ought to know, what or of what kind a thing is, which he has accepted, free or subject to a service, burdened or not burdened, charged or not [charged]

vel non, & omnia debet diligenter perscrutari & inquirere ; cùm ignorantia ipsum non excusat, & cùm liceat contrahentibus sese ad invicem decipere. Sed hæc quæ dicuntur, magis habent locum in venditionibus quàm in donationibus, secundꝺ quod inferiùs dicetur pleniùs, de emptione & venditione. Cùm enim capitalis dominus ex tali conventione se posuerit in seysinam, rem retinere non poterit, nisi tantum dederit, quantum quilibet alius dare voluerit. Hoc enim tacitè intelligitur, licèt in instrumento expresse non exprimatur, & si illam sic recusaverit, benè liceat feoffato suo inde facere, quod voluerit, dum tamen res priùs offeratur domino sub eadem conditione, & hæc vera sunt, nisi priùs inter dñm & tenentem suum convenerit de certo precio. Item poterit donator ex speciali conventione, contra jus commune, conditionem suam meliorem facere in causa donationis, ut si pro homagio & servitio suo donationem fecerit, ad homagium verò pertinet warrantizatio & defensio, & excambium, si warrantizare non possit, & ex speciali conventione exonerari possit dñs, si specialiter in donatione convenerit, ne warrantizet, & sic poterit tenens gratis renunciare iis, q̃ pro se introducta sunt à lege, contra jus commune. Item vice versa, poterit donatorius conditionem suam meliorem facere in causa donationis, ex speciali conventione contra jus commune, ita videlicet cùm ad homagium & servitium regale pertineat custodia & hæredis maritagium, ex speciali conventione poterit tenens exonerare suos hæredes & suum tenementum, ne capitalis dñs habeat custodiam & maritagium, si ita specialiter convenerit, contra jus commune, & ita poterit tenens conditionem suam meliorare, & dominus suam pejorem facere. Et unde cùm hæredes tenentis semel acquietantiam habuerint in vita capita-

faulty or not [faulty], and he ought diligently to search out and enquire, since ignorance does not excuse him, and since it is allowable to parties, who are contracting, to deceive one another. But these things, which are being discussed, have more a place in sales, than in donations, according to what will be said below, of buying and of selling. For when a chief lord upon such an agreement has put himself into seysine, he cannot retain the thing, unless he has given as much as any one else would give; far this is tacitly understood, although it is not expressly stated in the instrument, and if he has on that account refused it, it would be allowable for his feoffee to do thereupon what he chooses, provided the thing be first offered to the lord on the same condition; and these things are true, unless it has been previously agreed upon between the lord and the tenant as to a certain price. Likewise a donor may by a special covenant, contrary to the common law, make his condition better in a cause of donation, as if he shall have made the donation for homage and service; but warranty and defence appertain to service, and compensation, if he cannot warrant, and by a special covenant the lord may be exonerated, if he has specially agreed in the donation not to warrant, and then the tenant may gratuitously renounce those things, which have been introduced on his behalf by the law, contrary to the common law. Likewise, on the reverse, the donatory may make his condition better in a cause of donation, by a special covenant contrary to the common law; thus for instance since the custody and maritage of the heir belongs to homage and a royal service, the tenant by a special covenant may exonerate his heirs and his tenement, so that the chief lord may not have the custody nor the maritage, if it be so agreed, contrary to the common law, and thus the tenant may ameliorate his condition and the lord may deteriorate his [condition]. And hence, when the heir of the tenant has once had his acquittance

lis dñi, vel hæred̄ suorum, licèt hæredes capitalis domini infra ætatem fuerint, & in custodia dominoꝝ suoꝝ, tales capitales domini nil juris clamare poterunt in custodia vel maritagio hæredis ultimi tenentis, quia si petāt, nihil petere possunt nisi nomine hæredis sui feoffati, sed si ipse esset plenæ ætatis, nihil petere posset, opposita convẽtione, nec ipsi p̱ consequens, qui petunt nomine suo. Unū tamen obstare possit, si uterque hæres infra ætatem extiterit, & hæres ultimi tenentis acquietantiam nunquā habuit, quia si capitalis dominus petat, & excipiatur contra ipsum de conventione, & ad probandum exceptionē licèt charta vel aliud instrumentum p̱ducatur, replicari poterit à domino, q̱ hæres tenentis sui non poterit ad exceptionem & chartā respondere, & sic obtinebit ea vice. Sed quæritur, an propter hoc debeat charta vacua remanere, videtur, quòd non, quia adhuc durat obligatio inter hæredes primi tenentis & secundi, & non sunt deusitati, cùm uti vellent, si possent. Et ita poterit quis, ex conventione speciali, renunciare iis, quæ p̱ se introducta sunt
f. 49. & suis, qui à se causam trahunt & originem, et sicut poterit quis renunciare iis, quæ pro se et suis introducta sunt contra jus commune; ita non poterit renuntiare iis, quæ p̱ aliis introducta sunt, et in præjudicium aliorum, quia hoc esset injuriosum aliis, cùm hoc noluerint, sibi ipsi non erit injuriosum, cùm hoc voluerit, licèt contra jus commune; scienti enim et volenti non fit injuria, et ideò dicitur scienti et volenti, quia, qui errat, non consentit. Item esto, quòd quis donationem faciat sub iis verbis, s. tenendum tali et hæredibus suis,

in the life of the chief lord or of his heirs, although the heirs of the chief lord have been under age, and in the custody of their lords, such chief lords cannot claim any right in the custody or maritage of the heir of the last tenant, for if they claim, they can not claim except in the name of the heirs of his feoffee, but if he was of full age, he could claim nothing, the covenant being in the way, nor themselves consequently, who claim in his name. One thing, however, may be in the way, if either heir has been under age, and the heir of the last tenant has never had an acquittance, because if the chief lord claims and an exception be made against him on account of the covenant, and although a deed or other instrument be produced to prove the exception, it may be replied by the lord, that the heir of his tenant cannot make answer to an exception and a deed, and so he will prevail for that turn. But it is asked, whether on this account the deed ought to remain void, it seems not so, because the obligaton still lasts between the heirs of the first and of the second tenant, and they are not affected by disuser, when they wish to use it, if they can. And so a person may by a special covenant renounce those things, which have been introduced for himself and his relations, f. 49. for they derive their cause and origin from him, and as a person may renounce those things which have been introduced for the benefit of himself and his relations contrary to the common law; so he cannot renounce those things, which have been introduced for the benefit of others, and to the prejudice of others, for that would be injurious to others, since they would be unwilling to suffer this, whilst to himself it would not be injurious, since he was willing, although contrary to the common law, for injury is not done to a person who is knowing and is willing, and the phrase knowing and willing is used, because he, who is in error, does not consent. Likewise let it be, that some one has made a donation in these words, for instance, to hold to him and to his heirs or to whom-

vel cui dare vel legare voluerit, videtur prima facie quòd hæc dictio (legare) supervacua sit, et haberi debet p̲ non adjecta, cùm laicum feodum legari non possit, nisi in rebus specialibus, sicut burgagiis, et unde si laicum feodum petatur ex causa testamentaria in seculari foro, audiri non debet legatari[2], quia causa testam̃taria non tractatur in tali foro, sed specialiter excipitur, ne tractetur. Si autem petatur in foro ecclesiastico, ibi obstabit regia prohibitio, et unde videtur, quòd in quolibet foro deficit ei actio, cùm sit extra possessionem. Sed si in possessione extiterit ex causa legati, et hæres petat per assisam mortis antecessoris, quæritur an elidi possit actio petentis per exceptionem donationis ex causa legati, ex quo antecessor testator hoc noluit, licèt contra jus commune, ad tollendam assisam mortis antecessoris. Respondeo, videtur quòd talis adjectio valere non debeat, quia legare possit, cùm legatum sit donatio mortis causa, et legatum tantùm morte cõfirmatur, et donatio inter vivos traditione. Si autem esse debet donatio inter vivos, tunc oportet, quòd traditio sequatur in vita donatoris. Si autem causa mortis, sequitur traditio post mortem. Sed si nulla traditio ante mortem, tunc non valebit donatio inter vivos, non magis quàm assignatio. Si autem post mortem fiat traditio, quasi ex donatione inter vivos per modum adjectum in donatione, quasi de legato, non valebit ut donatio inter vivos; quia in vita non est subsequuta traditio, nec etiam ut legatum, quia non est purè legatū, sed adjectio et sequela donationis inter vivos, et ideò nulla ratione valere debet ut donatio vel

soever he wishes to give it or to bequeath it, it seems at first sight that the phrase "to bequeath" is superfluous and ought to be regarded as not added, since a lay fee cannot be bequeathed, except in special things, as in burgage tenements, and hence, if a lay fee be claimed in a testamentary suit in a secular court, the legatee ought not to be heard, because a testamentary suit is not treated in such a court, but there is a special exception, that it should not be there treated. But if it be claimed in an ecclesiastical court, the royal prohibition will there be in the way, and hence it seems that in each court an action fails him, since he is out of possession. But if he be in possession in a suit for a legacy, and the heir claims by an assise of the death of an ancestor, it is asked whether the action of the claimant can be parried by an exception of a donation by way of legacy on the ground that the ancestor, the testator, willed this, although against the common law, in order to take away an assise of the death of an ancestor. I answer, it seems that such an addition ought not to avail, because he had the power to bequeath, since a legacy is a donation in view of death, and a legacy is confirmed only by death, whilst a donation between the living is confirmed by delivery. But if it ought to be a donation between the living, then it is requisite that delivery should follow in the lifetime of the donor. But if in view of death, delivery follows after death. But if there be no delivery before death, then a donation between the living is of no more validity than an assignment. But if delivery be made after death, as if upon a donation between the living by a mode added in the donation, as if it were a case of legacy, it will not be valid as a donation between the living; because delivery has not followed in life; nor as a legacy, because it is not absolutely a legacy, but an addition and a sequel to a donation between the living, and therefore it ought not by any means to avail as a donation or as a legacy,

legatum, et tamen tali donatorio nulla competeret actio, si esset extra seysinam meritò, nec competeret ei exceptio contra assisam mortis antecessoris, cùm sit in seysina.

Cap. XX.

1. Qualiter quis uti debeat seysina.

Quum autem possessio fuerit acquisita, quamvis donatori⁹ liberum habeat tenem̃tum, statim tamen ad declarationem possessionis, ne imaginaria sit donatio, quāvis inducatur in vacuā possessionē, oportet uti seysina sua, et unde, cùm res data fuerit minori vel majori, oportet, q ille, cui data fuerit, si major fuerit, utatur fruatur seysina sua p seipsum, vel p ꝑcuratorem quēcunq, liberū vel servū, qui nomine suo fuerit in possessione, et qui fruct⁹, et ꝑvent⁹ et ꝑficua cōvertat in usus donatorii, et nihil in usus donatoris. Si autem minor fuerit vel impotens sui, oportet, q utatur per tutorem, vel ꝑcuratorem datum à donatore, quia si ipse
f. 49 b. donator, pater, vel alius in seysina remāserit, & ꝑfect⁹ in usus ꝑprios cōvertat, quāvis hoc fecerit quasi curator, & ita seysitus obierit, quāvis homagium & charta intervenerit & seysina cum solennitate, adhuc non valebit donatio, nec etiā si donatori⁹, ratione p̃dictoꝝ, post mortem donatoris se posuerit in seysinā, & statī eject⁹ fuerit, p assisā novæ disseysinæ non recuperabit. Si autem p negligentiā veri hæredis longā habuerit seysinā & pacificā, & post intervallum eject⁹ fuerit, recuperabit, quia sine judicio, & vero hæredi competit assisa mortis antecessoris. Idem erit, q non valebit donatio, si, cùm simul fuerint in possessione, terrā

and nevertheless such a donatory would have no right of action if he was out of seysine deservedly, nor could he except to an assise of the death of an ancestor, since he is in seysine.

Chapter XX.

1. In what way each person ought to use seysine.

But when possession has been acquired, although the donatory has a freehold, immediately nevertheless for the declaration of his possession, lest the donation should be imaginary, although he be inducted into the vacant possession, he ought to use his seysine, and hence, when a thing is given to a major or a minor, it behoves that he, to whom it is given, if he be a major, should use and enjoy his seysine by himself, or by an agent, free or servile, who shall be in possession in his own name, and who shall convert the fruits and the produce and the profits to the use of the donatory. But if he be a minor or unable to govern himself, he ought to use it through a tutor or an agent appointed by the donor, because if the donor himself, the father or another, has remained in f. 49 b. seysine, and has converted the profits to his own uses, although he has done this as it were as guardian of the estate, and has died so seysed, although homage and a deed has intervened and a seysine with solemnity, still the donation will not be valid, nor even, if the donatory, in regard of the matters aforesaid, has put himself into seysine immediately after the death of the donor, and has been forthwith ejected, shall he recover by an assise of novel disseysine. But if through the negligence of the true heir he shall have had a long and peaceable seysine, and shall have been ejected after a long interval, he shall recover, because [it has been done] without a judgment, and the true heir is entitled to an assise of the death of an ancestor. The same thing will result, that the donation will not be valid, if when they have both been in possession, have together cultivated the

simul excoluerint, & fructᵒ expenderint in cōmuni, ex toto vel ex parte, per usum enim videri poterit, quid lateat in animo donatoris, & hæc vera sunt, sive continua sit possessio donatoris, sive ꝑ particulas distincta, donator enim ꝑ talem usum ꝑpriam seysinā continuat, & seysinam donatorii impedit, & adnihilat. Et videtur ꝑ talem usum, q̄ à possessione non recessit animo, nec corpore. Item si in charta donationis contineatur, quòd donator rem integram donaverit, & donatorius in parte aliqua usus fuerit, & donator in alia, continuat per hoc donator seysinā suam in toto, nisi aliqua pars specialiter sit excepta. Sed si donatorius in parte aliqua usus fuerit, ita quòd donator in nulla parte, & eo animo, ut fund' possideat usq̄ ad terminos, talis usus sufficit ad totum fundum retinendum. Si autem donatorius in pertinentiis, & donator in principali, donator totum retinebit per usum suum, & donatorius per usum suum nihil acquiret, quia aut totum aut nihil; quia in animo donatoris esse deberet totum transferre, & in animo donatorii totum recipere. Malè actum est in contrarium, inter Rogeř de Reyne & Roberť de Shute, de terra de Vulvertō cū hundř pertiñ, ubi ꝑ talem usum adjudicatum fuit, q̄ Rogerᵒ retineret hundredum ꝑpter usum de hundredo, ubi Richardus, frater Rogeri, donator nunquam recessit à terra, ad quā hundredum pertinuit, & est solutio ut videtur, q̄, si simul utantur in principali, valere non debeat donatio, multò fortiùs valere non debeat, si donator in principali & donatorius in pertinentiis, cùm principale sit caput, & ptinens membrum, & utrumq̄ corpus fit, &

land, and expended the fruits in common, either in whole or in part, for it may appear through the use, what is latent in the mind of the donor, and these things are true whether the possession of the donor be continuous, or distinct in parts, for the donor by such use continues his own seysine, and impedes and annihilates the seysine of the donatory. And it appears from such use, that he has not withdrawn from the possession in intention nor in person. Likewise if it be contained in the deed of donation, that the donor has given the whole thing, and the donatory has used it in one part and the donor in another, the donor continues his seysine of the whole, unless some part has been specially excepted. But if the donatory has used it in some part, so that the donor has used it in no part, and with the intention to possess the estate as far as its boundaries, such an use is sufficient to retain the whole estate. But if the donatory has used it in its appurtenances, and the donor in its principal substance, the donor will retain the whole through his own use, and the donatory will acquire nothing through his own use, because [he must acquire] the whole or nothing, because it was in the intention of the donor to transfer the whole, and it was in the intention of the donatory to receive the whole. It was badly decided the contrary way between Roger de Reyne and Robert de Shute concerning the land of Vulverton with the hundred pertaining to it, where it was adjudicated through such an use, that Roger should retain the hundred on account of his use of the hundred, where Richard, the brother of Roger, the donor, never withdrew from the land, to which the hundred pertained; and the explanation is, as it seems, that if they have together used it in the principal substance, the donation ought not to be valid; much more ought it not to be valid, if the donor [has used it] in the principal substance, and the donatory in its appurtenances, since the principal substance is the head, and an appurtenance is a member, and each makes

sic utuntur simul in uno corpore, quod est ipsa res, integrè data. Si autem diversæ essent res, & quarum nulla aliam contingit, & simul datæ, ut si dicatur, Do tibi talem rem & talem, aliud erit, vel si quis aliā rem dederit cum ptiñ, retenta tantùm sibi aliqua parte rei donatæ, non enī ꝑdest donatorio donatio, vel usus suus in aliqua parte rei donatæ, si donator utatur in parte aliqua rei donatæ, sive simul sive vicissim, in una domo vel in diversis, in uno loco vel in diversis, quæ sunt de corpore vel ꝑtinentiis rei datæ, quia donator aniñ habere debeat, ut. totum trāsferat, & donatori^{9}, ut totum recipiat, & cùm uterq; utatur, donator per usum suum toī retinet, & donatori^{9} ꝑ usum suum nihil acquirit. Item si statim & eodem die, quo recessit, vel in crastino revertatur, hospitium charitativè petitur^{9}, secund' q in parte dicitur superiùs, & admissus, utatur fruatur ut pri^{9}, & se gerendo ut dominus, licèt voce ꝑfiteatur contrarium, per hoc videtur quòd à seysina animo non recessit, et unde si ita admiss^{9} alium fortè feoffaverit, vel donatorium ejecerit, donatorius per assisam non recuperabit. Si autem hoc fecerit post longum intervallum, sicut annum vel post biennium, dum tamē finis & chirographum in curia domini regis intervenerit, aliud erit, donatore extra seysinā existente, erit etiam quasi novus contract^{9}, cùm veterem non tangat donationem. Et illud idem dici potest, si extra curiā regiam ꝑ aliam scripturā sine fine & chirographo regio, dum tamen ꝑbari possit cōventio & scriptura, quæ lecta sit in publico & audita. Et ita mutari poterit donatio post intervallum, de

f. 50.

up the body, and so they use them together in one body, which is the thing itself given in its integrity. But if the things were different, and neither of them touches the other, and they were given together, as if it should be said, I give you such a thing and such a thing, it will be different, or if a person gives another thing with its appurtenances, having retained only for himself some part of the thing given, for the donation does not profit the donatory or his use in some part of the thing given, if the donor uses some part of the thing given, either simultaneously or in turns, in one house or in different houses, in one place or in different places, which are either part of the substance or of the appurtenances of the thing given, because the donor ought to have the intention to transfer the whole, and the donatory to receive the whole, and since each uses it, the donor retains it by his use, and the donatory acquires nothing by his use. Likewise if forthwith and on the same day in which he has withdrawn from it, or on the next day he should return, intending to claim hospitality by way of charity, according to what has been said in part above, and having been admitted uses and enjoys it as before, and conducting himself as lord, although in words he professes the contrary, it seems through this that he has not in intention withdrawn from it, and hence, if so admitted, he has by chance enfeoffed another, or ejected the donatory, the donatory shall not recover by an assise. But if he shall have done this after a long interval, as a year, or after two years, provided that a fine and a deed have intervened in the court of our lord the king, it will be otherwise, the donor being out of seysine, there will also be as it were a new contradictor, since it does not touch the old donation. And the same may be said, if outside the king's court by another writing without a fine and royal chirograph, provided the agreement and the writing can be proved, which has been read and heard in public. And so a donation may be changed f. 50.

partium voluntate. Et quòd ea, quæ dicta sunt, vera sunt, videri poterit per exemplum, ut de itinere episcopi Dunholm̃,[1] & M. de P. in comitatu Eborū añ regis H. tertio, assisa novæ disseysinæ, si Roger[9] de Halgheton,[2] ubi dicitur, quòd quidam dedit filio suo juniori unam virgatam terræ p quinq; annos ante mortem suam, & fecit ei seysinam, & omnem solennitatem in donatione facienda, & posteà recessit à terra illa usq; ad aliam terrā suā, & ita habuit filium suum in custodia sua tota vita sua, sed omnes fruct[9] in ꝑprios usus convertit, & quando pater obiit, posuit se puer ille in terram illam, & verus hæres statim ejecit eum, & puer non recuperavit; quia pater excepit expletia tota vita sua, quamvis juratores dicerent, quòd hoc fecit ratione custodiæ pueri sui, & si hæres eum statim ejicere non possit, recuperare poterit per assisam mortis antecessoris, ut de t̃mino Sancti Michaelis anno regis H. tertio incipiente quarto. Item cùm simul fuerint in possessione donator & donatori[9], & donator alium feoffaverit, et in seysinā posuerit, & priùs feoffatum ejecerit, per assisam novæ disseysinæ non recuperabit, ut de t̃mino Sancti Michaelis anno regis H. decimosexto incipiente decimoseptimo, in comitatu Suffolke de Wilhelmo de Fraxino. Item esto, quòd quis dederit alicui medietatem t̃ræ suæ in maritagium cum filia sua, sive certa sit pars sive incerta, et omnes in una domo & eadem terra insimul commorentur, & blada expenderint in communi, & donator ita moriatur seysitus, non valebit illa donatio, ut de ultimo itinere M. de P. in comitatu Suffolke, assisa novæ disseysinæ, si Anselmus. Item facit ad materiā istā, q̃ habetis de itinere Simonis de Pateshull in comitatu Leic. & Suff. ubi dicitur,

[1] "Dunelm," MS. Rawl.

[2] "si Reynerus de Halghtone," MS. Rawl.

after an interval with the will of the parties. And that these things, which have been said, are true, may be seen from an example as in the iter of the bishop of Durham and Martin de Pateshull in the county of York, in the third year of king Henry, an assise of novel disseysine, if Roger de Halgheton, where it is said that a man gave to his younger son one rood of land for five years before his death, and gave him seysine of it and every solemnity in making the donation, and afterwards withdrew from that land to another land of his own, and thus he had his son in his custody during all his life, but he converted all the fruits to his own uses, and when the father died, the boy put himself into that land, and the true heir ejected him forthwith, and the boy did not recover, because the father received all the profits during his lifetime, although the jurors say that he did this in regard of his custody of the boy, and if the heir cannot forthwith eject him, he will be able to recover it by an assise of the death of his ancestor, as in Michaelmas term in the third and fourth year of king Henry. Likewise when the donor and the donatory have together been in possession, and the donor has enfeoffed another, and put him into seysine, and has ejected the former feoffee, he shall not recover by an assise of novel disseysine, as in Michaelmas term as in the sixteenth and seventeenth year of king Henry in the county of Suffolk, in the case of William of the Ash. Likewise let it be that some one has given to some one half his land in maritage with his daughter, whether the part be certain or uncertain, and all reside together in one house and on the same land, and sow their corn in common, and the donor dies so seysed, such a donation will be invalid, as in the last iter of Martin de Pateshull in the county of Suffolk, an assise of novel disseysine, if Anselmus, &c. Likewise it makes for this matter, what you have in the iter of Simon de Pateshull in the counties of Leicester and of Suffolk, where it is said,

quòd si donator & donatorius simul fuerint in seysina usq; ad mortem donatoris, licèt donatorius omnia cepit expletia, cùm homagio & fidelitatib⁹ hominū, & licèt donator publicè protestetur, quòd ĩra non sit sua, sed donatorii, & quòd ipse sit hospes & charitativè suscept⁹ ut hospes, adhuc non valebit donatio; quia nihilominùs donator cōtinuat seysinam suam. Item facit ad materiā istā, q̃ habetis de ultimo itinere M. de P. in comitatu Suffolk, de quodam Johanne filio Hugonis & Alano fratre suo antenato. Casus talis est: Idem Alanus in vita Hugonis patris sui, cōcessit Johanni fratri suo postnato, per quandam conventionem inter eos factam, totam hæreditatem, quæ ei descendere debuit de prædicto Hugone patre eorum cōmuni, & Hugo se dimisit in curia domini capitalis, et capitalis dñs cepit homagium ipsius Johannis, sed Alanus tunc reclamavit, et Hugo postquā posuit Johannem in seysinā, vagavit p̃ patriam p̃ duos menses, et postea reversus, posuit se in terram illam, & sic fuit in seysina cum prædicto Johanne per unum annum & dimidium, et sic
f. 50 b. obiit seysitus, et quia sic obiit seysit⁹, et quia sic reclamavit Alanus, et quia facta fuit cōcessio de re non vacante, et longè antequā idem Hugo se dimisisset, idem Johannes, eject⁹ p̃ Alanū, non recuperavit seysinā suā per assisā.

2. Quod non valet donatio, nisi donator totaliter se dimittat de re data, et totaliter se tenet extra.

Item facit ad materiā istā, q̃ habetis de ultimo itinere M. de P. in comitatu Lanc. anno regni regis H. decimosexto, ubi capta fuit quædam jurata apud Lincolñ, si Roger⁹ de Monte Vegonis,[1] anno & die quo obiit, fuit in seysina de quibusdā terris, & qui dixerunt, q̃ prædict⁹ Roger⁹ non fuit seysitus anno & die quo obiit, quia diu ante mortem suā dedit terrā illā cuidā Johanni de Lunguilers, qui semper posteà remāsit in

[1] "Monte Begonis," MS. Rawl.

that if the donor and the donatory have been together in seysine up to the death of the donor, although the donatory has taken all the profits, with the homage and the fealties of the men, and although the donor has publicly protested that the land is not his but the donatory's, and that he is a guest, and has been received in charity as a guest, still the donation will not be valid, because the donor continues his seysine. Likewise it makes for the same matter, what you have in the last iter of Martin de Pateshull in the county of Suffolk, concerning a certain John, son of Hugh, and Alan his brother born before him. The case was in this wise: The same Alan in the life of Hugh the father, granted to John, his after-born brother, by a certain agreement made between them, the whole inheritance, which ought to descend to him from the aforesaid Hugh, their common father, and Hugh released himself in the court of the chief lord, and the chief lord received homage from John himself, but Alan then reclaimed it, and Hugh, after he had put John into seysine, wandered about through the country for two months, and afterwards having returned put himself into that land, and so was in seysine with the aforesaid John for a year and a half, and so died seysed, and because he so died seysed, and f. 50
because Alan so reclaimed, and because there was a concession of a thing not vacant and long before the same Hugh had released himself, the same John having been ejected by Alan did not recover his seysine by an assise.

2. That a donation is not valid, unless the donor totally releases himself from the thing given, and totally keeps him-

Likewise it makes for that matter, what you have in the last iter of Martin de Pateshull in the county of Lancaster, in the sixteenth year of the reign of king Henry, where a certain jury was summoned at Lincoln, if Roger of Monte Vego was, in the year and on the day when he died, in seysine of certain lands, and who said, that the aforesaid Roger was not seysed in the year and on the day when he died, because a long time before his death he gave that land to a certain John de Lunguilers,

seysina, usq; ad mortē ipsi⁹ Rogeri, & excoluit terrā illā & blada expendit, & reddit⁹ & expletia cepit, & etiam quintā decimā dedit dño regi apud Lincolniam, & unde in itinere ejusdem apud Lanc. eodem annō, cōvicti fuerunt juratores per triginta sex milites de comitatu Eborum & Lanc. sicut cōtinetur in principio rotuli. Et unde triginta sex milites dixerunt, q̄ idem Roger⁹ venit ad comitatum Lanc. & dedit cuidā Johanni de Lunguilers terrā illā, per quandā chartam, & liberavit ei chartā in pleno com̄, sed Roger⁹ semper remansit in seysina, quousq; ad mortē, & cepit omnia expletia, & legavit omnia bona mobilia, & nunquā amovit ballivos nec servientes suos, quos ibi priùs posuerat, nec in aliquo statum suum mutavit, & unde ibidem adjudicatum fuit, q̄ Rogerus obiit seysitus, & q̄ xij. de com̄ Lincolñ falsum fecerunt sacram̄tum, & ideò cōvicti, quia dixerunt cōtrarium; & q̄ prima jurata cōvicta fuit p̄ secundā. Illud idē invenietis ibidē, de eodem Rogero, & Henrico de Marř,[1] quia idem Roger⁹ semper cepit expletia, usq; ad mortem. Item esto, q̄ cùm donator & donatori⁹ ita fuerint simul in seysina, q̄ donatori⁹ rem sic datā dederit alicui, quæritur an valet donatio? Revera non valet, quia neuter eorū inducitur in vacuā possessionem, si autē cùm ambo in possessione fuerint, donator alteri dederit, & primū donatorium ejecerit, & eject⁹ nō recuperabit, quia seysinā vacuā, & p̄ se non habuit, nec possidere incepit, ex quo donator possidere non desiit. Cùm autē uñq; sic fuerit in possessione, tam donator quàm donatori⁹

[1] "Henrico de Mare," MS. Rawl.

who had remained always afterwards in seysine up to the death of Roger himself, and had cultivated that land and expended seed corn upon it, and had taken the returns and the profits, and even had granted a fifteenth to the lord the king at Lincoln, and thereupon in the iter of the same [chief justice] at Lancaster in the same year the said jurors were convicted by thirty-six knights of the counties of York and Lancaster, as is contained in the commencement of the roll. And thereupon the thirty-six knights said, that the same Roger came to the county of Lancaster and gave to a certain John de Lunguillers that land by a certain deed, and delivered to him the deed in the full county, but Roger always remained in seysine up to his death, and took all the profits and bequeathed all the moveable goods, and never removed the bailiffs or his servants, whom he had formerly placed there, nor in any respect had changed his state, and hence it was adjudicated in the same place that Roger died seysed, and that the twelve of the county of Lincoln had made a false oath, and thereupon they were convicted, because they said the contrary; and because the first jury was convicted by the second. You will find also in the same place concerning the same Roger and Henry de Morre, because the same Roger always took the profits up to his death. Likewise let it be that when the donor and the donatory were together in seysine, that the donatory has given to some person the thing so given [to him], it is asked whether the donation is valid? Certainly it is not valid, because neither of them is inducted into a vacant possession; but, if when both are in possession, the donor has given it to another, and has ejected the first donatory, the ejected [party] shall not recover, because he had not a vacant seysine and did not possess by himself, nor did he begin to possess, since the donor did not cease to possess. But since each was in possession, the donor as well as the donatory after the donation, and they have

self aloof from it.

post donationem, & simul exiverint à possessione, non aliter perpendi poterit de voluntate donatoris, quàm ꝑ usum, quia ꝑ exteriora præsumitur de interiorib⁹, & ꝑ interiora judicare debem⁹, & quāvis in recessu utriusq; donator seysinā liberavit donatorio, nihilominùs tamen habere poterit animū possidēdi, & retinere possessionem civilē. Homo enim secūdum faciem judicat ut homo, sol⁹ autē De⁹ cor hominis intuetur, qui novit abscondita cordis, & renes scrutatur & corda; nullū enim apud Deum secretum. Per usum igitur poterit veritas declarari, sed si cum animo revertendi recessit donator à possessione, cùm donatorium induxerit in possessionem, & mox reversus quacūq; de causa simulata non admittatur, si repellatur, non cōpetit ei assisa novæ diss. quāvis dicat q animū recedēdi à possessione non habuerit, & in hoc casu p̃fertur opinio veritati, quia, ex quo gratis cū solennitate nō coact⁹ exivit, p̃sumitur vehem̃ť ad min⁹, q animū verū revertendi nō habuit, & sive causā haberet sive nō, posset quilibet dicere, q animum non haberet recedendi, & sic revocare q actū
f. 51. esset. Et unde, sive sic sive non, sic cōsultè faciet donatori⁹, si extra seysinā tenuerit donatorem, & cùm donatorio ꝑ assisam fuerit adjudicata seysina, ꝑ hoc firma erit imperpetuum seysina donatorii, & ulteri⁹ nō erit imaginaria donatio, nec simulata, & unde ꝑ hoc posset donatori⁹ sine suspitione cōcessionē facere donatori tenendi ad vitā rem donatā. Itē vice versa, si donator reversus, sive ab initio animū revertendi habuerit sive nō, & donatorium ejecerit, si donatori⁹ sta-

gone out together from the possession, no other conclusion can be arrived at respecting the title of the donor, than by his use [of the thing], because we presume from exterior [acts] to internal [motives], and we must judge through internal motives, and, although in the recess of each person's [heart] the donor has delivered the seysine to the donatory, nevertheless he may have had an intention of possessing it and of retaining the civil possession. For man judges according to the [external] face as man. but God alone sees into the heart of man, who knoweth the secrets of the heart and searches the reins and the inward parts; for there is nothing secret before God. The truth therefore may be declared by use, but if the donor hath withdrawn from the possession with the intention of returning, when he has inducted the donatory into possession, and by and by having returned on some simulated cause he be not admitted, if he be repelled, he is not entitled to an assise of novel disseysine, although he may say, that he never had the intention of withdrawing from the possession, and in this case opinion is preferred to truth, for since he gratuitously with solemnity and with no compulsion went out, there is a vehement presumption at least, that he had not a true intention of returning, and whether he had cause or not, anybody might say, that he had not the intention of withdrawing, and so might revoke what had been done. And hence whether it be so or not, the donatory will act prudently, f. 51. if he keeps the donor out of seysine, and when the seysine has been adjudicated to the donatory by the assise, the donatory's seysine will be for ever firm, and the donation will not be any further imaginary or simulated, and hence through this the donatory may without suspicion make a concession to the donor of holding for his life the thing given. Likewise in the opposite case, if the donor has returned, whether he had from the beginning the intention of returning or not, and he has ejected the donatory, if the donatory cannot forthwith

tim ipsum ejicere nō possit, cōpetit ei assisa novæ diss., nō obstāte sibi aliqua exceptione teneræ seysinæ, ꝑdest enim possidere, quotiens ex volūtate ejꝰ, ad quem res ꝑtinet, possideri ceptū ẽ, & sufficit semel voluisse, omnibꝰ cōcurrētibꝰ quæ faciunt donationē validā, & si posteaquam ceptū est possideri, voluntas ejꝰ, ad quem res ꝑtinet, accesserit, licèt nulla ab initio intvenerit, sufficit tamen ex postfacto, & prodesse debet possessori. Itē si quis, voluntate ejus, ad quem res ꝑtinet, possidere inceperit, quamvis voluntas ejꝰ posteà non ꝑseveret, nihil nocet possessori, quia semel cepit possidere ex voluntate, ut in primo casu. Et idē erit, si cùm ambo à possessione recesserint, facta traditione, & nemine in possessione relicto, statim reversus donator, mittat se in possessionē, si donatoriꝰ statim reversus eum eiicere non possit, cōpetit assisa novæ disseysinæ donatorio.

Cap. XXI.

1. Qualiter amittitur possessio acquisita.

Dictum est suprà, qualiṫ possessio retineatur, & per quas ꝑsonas, & qualiter donatoriꝰ uti debeat. Nunc autē dicendū, qualiṫ acq̃sita amittatur. Et sciendum, q̃ ferè eodē modo amittitur possessio, quo acquiritur; acquiritur enim corpore & animo, & nō amittitur, nisi utroq̃ modo, licèt retineri poterit tantùm animo, secundùm q̃ superiùs dictum est. Et unde, cùm quis naturalem habuerit possessionē & civilē ex aliqua justa causa acquisitionis, statim cùm donationē fecerit ꝑ traditionem animo trāsferendi, statim amittit & desinit

eject him, he is entitled to an assise of novel disseysine, notwithstanding any objection of tender seysine, for it is for his advantage to possess, as often as with the will of him, to whom the thing belongs, possession has begun to be taken; and it is sufficient [for him] to have once willed it, with all things concurring, which make a valid donation, and if after possession has begun to be taken, the will of him, to whom the thing belongs, has been added, although it did not intervene at the commencement, it is sufficient, however, after the event, and ought to be for the benefit of the possessor. Likewise if any person has begun to possess with the will of him, to whom the thing belongs, although his will does not afterwards persevere, it does not damage the possessor, for he has for once begun to possess with his will, as in the first case. And it will be the same, if when both have withdrawn from the possession upon delivery being made, and no one being left in possession, the donor having immediately returned, puts himself into possession, if the donatory having immediately returned cannot eject him, the donatory is entitled to an assise of novel disseysine.

Chapter XXI.

1. In what way possession, when acquired, is lost.

It has been discussed above in what way possession is retained, and through what persons, and in what way a donatory ought to use it. Now indeed we must discuss in what way possession, when acquired, is lost. And it is to be known that possession is lost almost in the same way, as it is acquired. For it is acquired with the body and with the mind, and it is not lost except in both ways, although it may be retained with the mind, as has been said above. And hence when a person has natural and civil possession from a just cause of acquisition, forthwith, when he has made a donation by delivery with the intention of transferring [possession], he loses

habere utrāq; ex ipsa traditione. Et eodē modo, si quis utrāq; habuerit, & cōtra volūtatē suā disseysit^{9} fuerit & eject^{9}, statim amittit naturalē, civilem autē nequaquā, donec iterū se reponere velit in seysinā & repellatur, vel si crediderit se posse repelli, abstineat à seysiñ, & ad superioř recurrat, & tunc desinit possideř. Sed si recenter dum civilē habuerit, rejecerit ejectorem, recuperat naturalē, & sic habet utrāq;, tā naturalē quàm civilē, & sic quādoq; desinit quis possidere, & ali^{9} incipit statim cùm alius desinit, sive fuit naturalis possessio ꝑ se, sive naturalis & civilis conjūctim. Itē cùm quis eject^{9} fuerit, et naturalē possessionem amiserit, si ad temp^{9} ꝑ negligentiā vel impotentiā vel patientiā injuriā dissimulaverit, amittit utrāq;, tam naturalē quàm civilem, cùm patientia trahatur ad cōsensū, & sic desinit ver^{9} dñs possidere, & incipit possidere possessor violēt^{9}. Et eodē modo, si verus dñs à possessione recesserit nemine suorū in possessione relicto, adhuc retinet utrāq;, naturalem & civilem, quousq; alius ingrediatur contra voluntatem suam, eo sciente vel ignorante; & tunc desinit verus dñs habere possessionem naturalem justam, & intrusor incipit habere naturalem sed injustam, sed retinet verus dominus civilem, quousq; reversus repellatur sine spe ponendi se in seysinam, vel cùm suspi-
f. 51 b. cetur se posse repelli, & tunc amittit utrāq; & intrusus incipit habere utrūq;, & cùm intrusus utrāq; habuerit, & sine judicio à vero dño ejectus fuerit, tunc fiet de eo sicut supra dicitur de vero dño, & ver^{9} dñs ꝑpt̄ suam injuriā amittit actionem suam & assisam, secun-

it, and ceases to have either of them immediately upon the act of delivery. And in the same way if any one has both, and against his will has been disseysed and ejected, he forthwith loses his natural possession, but by no means his civil [possession], until he wishes to replace himself in seysine and is repelled, or if he has believed that he might be repelled, he abstains from seysine and has recourse to a superior, and then he ceases to possess. But if recently, whilst he retains civil possession, he has repelled the ejector, he recovers natural possession, and so has both, the natural as well as the civil possession, and so whenever any one ceases to possess, another begins forthwith when the other ceases, whether it be a natural possession by itself, or a natural and civil possession conjointly. Likewise when a person has been ejected, and has lost the natural possession, if he has dissembled the injury for a time through negligence or impotence or sufferance, he loses both the natural and the civil [possession], since sufferance is construed as consent, and so the true lord ceases to possess, and the violent possessor begins to possess. And in the same manner, if the true lord has withdrawn from possession, none of his people being left in possession, he still retains both the natural and the civil possession, until another enters against his will, with his knowledge or without it; and then the true lord ceases to have natural and just possession, and the intruder begins to have natural but unjust possession, but the true lord retains the civil possession, until having returned he is repelled without the hope of putting himself into seysine, or when he suspects that he may be repelled, and then he loses them f. 51 b.
both, and the intruded begins to have them both, and when the intruded has them both, and without a judgment has been ejected by the true lord, then there will be done concerning him as has been above said concerning the true lord, and the true lord loses on account of his own injury his action and his assise, according to what will be

dùm q̄ inferiùs dicetur de assisa. Si autem hoc fecerit cum judicio, & p̄ assisam, vel recenter sine assisa, aliud erit. Item cùm malæ fidei possessor ita utrāq̄ habere inceperit, si ab extraneo ejectus fuerit, tunc fiat de eo, sicut fieri deberet de vero dño, quantùm ad extraneas p̄sonas. Item amittit quis utrāq̄ morte naturali vel civili, morte naturali civilem amittit in exitu animæ, & naturalem, cùm corpus efferatur[1] civilem & naturalem simul. Ex morte civili, cùm habitū religionis assumpserit, ita quòd ad seculum redire non possit. Item cùm in possessione extiterit, licèt eject⁹ non fuerit, si tamen p̄hibit⁹ fuerit uti frui, vel quòd cōmodè non possit, nec modo debito, per se nec per suos, vel si alius uti voluerit contra voluntatem suam, retinet dñs naturalem possessionem justam, & impediens vel perturbans, ex longa possessione, p̄ impotentiā vel negligentiā veri domini incipit habere quodammodo utrāq̄, naturalem & civilem; sed naturalem injustam. Et eodem modo fit, ubicunq̄ res alicujus sive in possessione fuerit sive extrà, contra voluntatem suam fuerit communicata, vel cōtractata, ædificando, arando, seminando, aquam divertendo, falcādo, fodiendo, vel quid aliud tale faciendo. Ecce hîc, quòd si quis sponte permittat alium arare, seminare vel meliorare terrā suā, non est disseysina, nec est negligentia ejus, qui patitur, sed cautela, si non permittat asportare fructus. Si autem voluntas ipsius, cujus res fuerit, intervenerit, aliud erit, cùm scienti & volenti non fiat injuria. Ut si aliquis terram meam araverit, seminaverit, & stercoraverit, vel alio modo melioraverit, & ego dissimulavero ad tempus,

[1] "efferatur. Civilem et naturalem simul ex morte civili," MS. Rawl.

said below concerning the assise. But if he has done this with a judgment and through the assise, or recently without an assise, it will be different. Likewise when a possessor in bad faith has thus begun to have them both, if he has been ejected by an outsider, then there will be done concerning him as ought to be done concerning the true lord, as far as regards outside persons. Likewise a person loses them both by natural death or by civil death, by natural death he loses civil [possession] when the soul leaves the body, and natural possession, when his body is carried forth to burial, the civil and natural [possession] simultaneously. Upon civil death, when he assumes the religious habit, so that he cannot return to the world. Likewise when he has been in possession, although he has not been ejected, if however he has been prohibited to use and enjoy, or that he cannot conveniently do so, nor in due manner, by himself or by his people, or if another has wished to use it against his will, the lord retains the natural and just possession, and the hinderer or the disturber from long possession owing to the impotence or negligence of the true lord begins to have in a certain manner each [kind of possession], natural and civil, but the natural [at the same time] unjust. And in the same manner it happens, wherever any one's estate, whether it be in his possession or out of his possession, shall have been contrary to his will interfered with or dealt with, by building, by ploughing, by sowing, by draining, by felling, by digging, or by doing any thing. Take the case, that some one spontaneously permits another to plough, to sow, or to ameliorate his land, it is not a disseysine nor a neglect of that person's, who allows it, but a cautious provision, if he does not permit him to carry away the crops. But if the will of him, whose thing it is, has intervened, it will be different, since injury is not done to a party who is knowing and willing. As if any one has ploughed, sowed, and manured or in any other way ameliorated my land, and I have dissembled at the time,

ut fructus cõsequi possim, si tamen ipsum vel alios statim arare, seminare non impedivero, sive meliorare; non tamen ꝑꝑ̃ hoc desino possidere, cùm hoc faciat de voluntate mea, quòd si contra faceret, statim esset ibi disseysina, & unde non erit ibi negligentia, imò cautela, ut fructus lucri faciat, vel alio modo conditionem veri domini meliorem. Sed cùm malæ fidei possessor fructꝰ & blada asportaverit, cùm hoc sit contra voluntatem domini, erit disseysina manifesta. Infra pleniùs de hac materia dicetur, inter assisas novæ disseysinæ.

Cap. XXII.

1. Qualiter acquiritur possessio per usucaptionem. Glanville, XIII. 32, 33.

Dictum est in præcedentibus, qualiter rerum corporalium dominia ex titulo, et justa causa acquirendi, transferuntur per traditionem. Nunc autem dicendum qualiter transferuntur sine titulo, & traditione, per usucaptionem, s. per longam, continuam, & pacificam possessionem, ex diuturno tempore & sine traditione; sed quàm longa esse debeat, non definitur à jure, sed ex justitiariorum discretione. Continuam dico, ita quòd non sit interrupta; interrumpi enim poterit multis modis, sine violentia adhibita, per denuntiationem & impetrationem diligentem, & diligentem prosequutionem, & per talem interruptionem, nunquam acquiret possidens, ex tempore, liberū teneñtū. Pacificā dico, quia si cõtentiosa fuerit, idem erit, q priùs, si cõtentio fuerit justa, ut si verus dñs statim, cùm intrusor vel disseysitor ingressus fuerit seysinā, recēter & incõtinenti (si præsens fuerit, vel si absens cùm redierit) nitatur tales viribꝰ repellere &[1] expellere, licèt id, q inceperit,

f. 52.

[1] "repellere et," omitted MS. Rawl.

that I may obtain the fruits, if however I shall not have hindered him or others forthwith to plough or sow or ameliorate, I do not on that account cease to possess, since he does this with my will, but if he did it otherwise, there would be there at once a disseysine, and hence there will not be there negligence, on the contrary a cautious provision, that the fruits may bring profit or in some way ameliorate the condition of the true lord. But when a possessor in bad faith has carried off the fruits and the corn, and this is done against the will of the lord, it is a manifest disseysine. There will be a further discussion of this subject amongst the assises of novel disseysine.

Chapter XXII.

1. In what way possession is acquired by usucaption.

It has been discussed in the preceding chapters how the dominion of corporeal things upon a title and just cause of acquisition is transferred by delivery. Now, however, we must discuss in what way they are transferred without a title or delivery, by usucaption, that is by long, continuous, and peaceable possession, from length of time and without delivery; but how long it should be is not defined by right, but according to the discretion of the justiciaries. I use the term "continuous," so that it should not be interrupted; for it may be interrupted in many ways, without the application of violence, by denunciation and urgent request, and urgent pursuit, and by such interruption the possessor will never acquire, f. 52. from time, a freehold. I use the term "peaceable," because if it be contentious, it will be the same as before, if the contention has been just, as if the true lord forthwith, when the intruder or disseysor has entered into seysine, endeavours soon and without delay (if he should be present, or if absent, when he shall have returned) to repel and to expel such persons by violence, although he cannot carry out to its effect what he has commenced,

ꝓducere non possit ad effectū, dum tamen, cùm defecerit, diligens sit ad impetrandū & ꝓsequendū. Et nota,[1] q̄ ex hoc capitulo habetur, q̄ acquiritur possessio & liberū teneм̃tum ex tempore, & sine titulo & traditione, ꝓ lōgam & pacificā seysinā, habitā ꝓ patientiā & negligentiā veri dñi. Injuriosa autē esse poterit cōtentio, vel injusta, ut si quis, ad quem non ꝓtinet, talibus questionē moveat vel contentionē vel inr̃uptionē, et unde si quis ꝓ intrusionē post mortē alicuj^{9} ante aditā hæreditatē ab hærede, ꝓpria authoritate se posuerit in seysinā vacuā, vel cum authoritate ej^{9}, qui nō habet donādi, cùm nō sit ver^{9} dñs. Itē si disseysitor, cùm disseysinā fecerit. Item si firmari^{9} ꝓ lōgum temp^{9}, post t̃minum præteritum. Itē, si quis contra cōventionē, quāvis inter alios factā, vel contra modū donationis, ut, q̄ omnino dare non posset vel alienare, vel non certis ꝑsonis. Item, si quis se posuerit in seysinā ex causa donationis ejus, qui jus nō habet, vel non nisi ad vitā, quacūq; ratione, ad exhæredationē veri hæredis. Item, si frat̃ postnat^{9}, ꝓpria authoritate, se intruserit in seysinā, vel fortè cùm habuerit authoritatē à capitali dño, vel ab aliquo ad quem non ꝓtinet, & quorum casus sunt infiniti: tales, sive titulū habuerint sive nō, quantum ad verum dñm, qui jus habet & ꝓprietatem, nūquam liberum teneм̃tum habebunt nisi ꝓ longā, cōtinuam, & pacificā possessionē, ut p̃dictum est, quātum vero ad non dñs, qui dederunt, vel quātum ad alios, qui jus non habent, statim & incontinenti incipiunt habere jus & liberū teneм̃tum, & incipiunt possidere, et cùm lōga, et pacifica & continua possessio intervenerit, incipiunt possidere quoad omnes, et habere liberū teneм̃tum, ita, quòd sine brevi vel

[1] "Et nota," down to "veri domini," omitted MSS. Rawl. and Crewe.

provided, however, when he fails, he is diligent in requesting and in pursuing. And note that from this chapter it is held, that possession and a freehold are acquired by time, and without a title or delivery, by long and peaceable seysine, enjoyed through the sufferance and negligence of the true lord. But the contention may be injurious or unjust, as if any one, to whom it does not belong, raises a question or a contention or an interruption against such persons, and hence if any one by intrusion after the death of any one, before the heir has claimed the inheritance, by his own authority has put himself into the vacant seysine, or by the authority of him who has no right to give, since he is not the true lord. Likewise if the disseysor, after he has made a disseysine. Likewise a farmer for a long period, after his term has elapsed. Likewise if any one contrary to a covenant, although made amongst others, or against the mode of the donation, as, that he cannot give or alienate it at all, or not to certain persons. Likewise if any one has put himself into seysine by reason of a donation from him, who had no right, or only for his life, in whatever manner, to the disinheritance of the true heir. Likewise if an after-born brother has intruded himself into seysine by his own authority or by chance, when he had authority from the chief lord, or from some one, to whom it does not belong, and of which there are infinite cases. Such persons, whether they have a title or not, as far as regards the true lord, who has the right and the property, will never have a freehold except by long, peaceable, and continuous possession, as has been said above; but as regards the non-owners, who have given it, or as regards others, who have no right, they forthwith and immediately begin to have the right and the freehold, and begin to possess, and when a long and peaceable and continuous possession has intervened, they begin to possess against all the world, and to have a freehold, so much so that they cannot be ejected without a writ and a judgment, for just

judicio ejici non possunt; quia sicut temp^{9} est mod^{9} inducendæ et tollendæ obligationis, ita erit mod^{9} acquirendæ possessionis, longa enim possessio (sicut jus) parit jus possidendi, & tollit actionē vero dño petenti quādoq; unam, quādoq; aliā, quādoq; omnem, quia omnes actiones in mundo, infra certa tempora habent limitationem. Sic enim, ut prædictum est, acquiritur possessio et liberū teñtum ex tempore, sine titulo et traditione, p patientiā & negligentiā veri dñi. Et sciendū, quòd non valet, si fuerit violenta, si incōtinenti resistatur, et hoc verum est, nisi fuerit p̃caria, quæ omni tempore revocari poterit, et idem si de gratia; gratia enim voluntaria est, & de voluntate cōtraria revocatur. Itē ubi fuerit clādestina, sicut noctuaria, vel cōcessa à ballivis in absentia dñorum. Itē si p̃cium incertū, s. quolibet anno vel tēpore mutatum, et alīnatum, secùs si ad certum. Et hæc locum habent inī privatas p̄sonas, inī regē et privatas p̄sonas non tenet istud, quia rex parē non habet, nec vicinum, nec superiorem.

2. Qualiter acquiritur possessio juris, quod tradi non potest, legum usu. f. 52 b.

Dictum est, qualiī quis acquirit possessionē rei corporalis ex tēpore & sine traditione, cùm usu vel sine; nunc autē dicendū qualiī acq̃riī possessio rei incorporalis, sicut possessio juris, vz. alicuj^{9} servitutis, p̄ patientiā, quæ trahitur ad cōsēsum, et longū usum et pacificum, sine cōstitutione vel expressa volūtate. Patientia verò trahitur ad consensum, & acquiritur possessio juris p̄ usum, ut si dñs p̄prietatis liberum habens fundum, ex patientia permiserit uti vicinum suum præsens & sciens, in fundo suo aliqua servitute, ubi jus utendi non habuerit, sicut in pastu pecorum, itinere,

Inst. II. t. iii.

as time is a mode of bringing on and of removing an obligation, so there will be a mode of acquiring possession, for long possession (like right) gives birth to the right of possession, and takes away from the true lord claiming it at one time one right of action, at another time another, and at other times all right of action, for all actions in the world have within certain periods a limitation. For thus, as above said, the possession and the freehold are acquired by time without a title and delivery, through the sufferance or the negligence of the true lord. And it is to be known, that [the possession] is not valid, if it shall have been violent, if it be forthwith resisted; and this is true, unless it be precarious, which may be recalled at any time, and the same if by favour, for favour is voluntary and is revoked by a contrary will. Likewise where it has been clandestine, as during the night, or permitted by the bailiffs in the absence of the lords. Likewise if for an uncertain time, for instance changed in any year or at any time and alternated, otherwise, if for a certain time. And these things have place between private persons, but it does not hold good between the king and private persons, for the king has neither peer, nor neighbour, nor superior.

2. In what way is acquired the possession of a right, which cannot be delivered, by the use of laws. f. 52 b.

It has been discussed in what way a person acquires possession of a corporeal thing from time or from delivery, with use or without it; now we must discuss in what way acquisition of an incorporeal thing is acquired, as the possession of a right, for instance, of any servitude, through sufferance, which is taken for consent, and through long and peaceable use without any settlement or expressed will. But sufferance is taken for consent, and the possession of a right is acquired through use, as if the lord of the property having a free estate, through sufferance has, when present and knowing the fact, allowed his neighbour to enjoy on his estate a servitude, where he had no right of enjoying it, as in the feeding of cattle, in using a footpath or a horse-path

vel actu vel aquæ ductu, vel hujusmodi p longum tempus, pacificè sine interruptione ; ex tali usu & patientia præsumitur de consensu, & de voluntate ; & ita acquiritur possessio ex tempore, ita quòd taliter utens, sine brevi et judicio ejici non poterit, et sicut consensus esse poterit tacitus, sicut expressus, sic poterit esse voluntas tacita vel expressa. Præsens et sciens dico, quia si absens fuerit, vel præsens & ignoraverit, et si sciret, ꝑhiberet, talis usus non valebit, cùm sit clandestin⁹; et idem erit, si nocturnus. Item idem erit, si violentus. Item idem, si ꝑcarius, qui tempestivè et intempestivè revocari poterit, cùm dependeat tantum de gratia & voluntate cōcedentis, sicut de tempore in tempus, de termino in terminum, sicut de anno in annum, ꝑ certo servitio, vel incerto cum termino præfinito, dum tamen si certum sit ꝑcium, vel servitium cum termino, erit possessio vera & sufficiens. Si autem incertum sit servitium cum termino vel sine, ut si aliquis haberet aliquādo plus, aliquādo minus, erit ibi potiùs locatio herbagii, quàm pastura. Si autem in absentia veri domini utatur quis de patientia, & ꝑmissione servientis, vel alterius qui jus non habet cōcedendi, vel constituendi servitutem, talis usus non sufficiet, nec valebit ad possessionem acquirendā.

Cap. XXIII.

De acquirendo rerum dominio incorporalium sicut

1. Dictum est superiùs qualiter acquiruntur rerum corporalium dominia, quæ traditionem patiuntur vel quasi, ex causa donationis, & qualiter postea transferuntur traditione expressè de persona in personam ex mutuo consensu, tacito vel expresso : tacito, qui sufficit

or in drawing water, or such like for a long time peaceably without interruption; from such an enjoyment and sufferance there is a presumption of consent and of willingness, and so possession is acquired temporarily, so that enjoying it in this manner, he cannot be ejected without a writ and a judgment, and as consent may be tacit as well as expressed, so willingness may be tacit or expressed. I have said when present and knowing, because if [the lord] has been absent, or present and ignorant, and would have prohibited it, if he had known it, such an enjoyment will not be valid, since it is clandestine, and it will be the same, if it be nocturnal. Likewise it will be same, if it be violent. Likewise the same, if it be precarious, which may be recalled in season or out of season, since it depends on the favour and willingness of the grantor, as from time to time, from term to term, as from year to year, for a certain service, or for an uncertain service within a definite time, provided that if the price be certain or the service with a term, the possession will be true and sufficient. But if the service be uncertain with a term or without, as if a person should have at one time more, at another time less, there will be in such a case a letting of the herbage, rather than a pasturage. But if in the absence of the true lord any body enjoys anything through the sufferance, and the permission of a servant, or of another, who has not the right of granting or establishing a servitude, such an enjoyment will not be sufficient, nor will it avail to acquire possession.

Chapter XXIII.

1. Of acquiring the dominion of incorporeal things, as concerning

It has been discussed above in what way is acquired the dominion of corporeal things, which admit [in fact], or as it were, of delivery, on the ground of donation, and in what way they are transferred by delivery expressly from person to person by mutual consent, tacit or express; tacit,

de juribus, libertatibus, et servitutibus.

pro traditione, eò quòd donatio expressè non revocatur, cùm possit; expresso, p ratihabitionem expressam. Item cùm quis adeptus fuerit possessionem per se, sine titulo & traditione, qualiter acquiritur possessio & dominium rerum ex tempore. Item qualiter rerum incorporalium, sicut juris, s. alicujus servitutis, in alieno acquiritur dominium & possessio per longum, continuum, & pacificum usum, sine consensu expresso, per patientiam veri domini, qui scivit & non prohibuit, sed permisit de consensu tacito. Nunc autem dicendum est, qualiter acquiruntur rerum incorporalium dominia, & possessio, sicut jurium, ex consensu expresso, ex causa donationis & cōstitutionis servitutis. Jura siq̃dem, cùm sint incorporalia, videri non poterunt, nec tangi, et ideò traditionem non patiuntur, sicut res corporales. Oportet igitur ex necessitate, q in hujusmodi cōtrahatur donatio ex affectu contrahentiū, & solo animo & voluntate trāsferendi, & accipiendi, & aspectu rei
f. 53. corporalis, cui insunt hujusmodi jura, & sic quasi possidentur ex fictione juris, & ille, qui sic in possessione fuerit ex juris fictione, semp quasi utitur, donec fuerit disseysitus p violentiam, vel sine violentia, per non usum. Acquiri enim poterit possessio rei corporalis sine usu, & similiter rei incorporalis quasi possessio, sine usu. Sed cùm usus intervenerit in re incorporali, retinetur possessio per usum, & efficitur vera, quæ prius fuit fictitia, & cùm quis usus fuerit jure tali, ad alium transferre poterit jus, & usum simul, quod non potuit ante usum. Item si ille, cui constituta fuerit servitus, in vita sua cùm nolit, vel non possit, usus non fuerit,

which suffices for delivery, because the donation is not expressly revoked, when it might be; express, by express ratification. Likewise when a person has acquired possession by himself, without a title or delivery, in what way the possession and dominion of things is acquired by time. Likewise in what way the dominion of incorporeal things, for instance of a right, that is, of a servitude is acquired in another person's property, and the possession of them through long continuous and peaceable use, without express consent, by sufferance of the true lord, who has known and has not prohibited, but permitted by tacit consent. But now we must consider in what way, the dominion and possession is acquired, of incorporeal things, such as of rights, from express consent, on the ground of a donation and the institution of a servitude. Rights indeed, when they are incorporeal, cannot be seen nor be touched, and therefore they do not admit of delivery, like corporeal things. It behoves therefore, from necessity, that in such a case the donation be contracted from the affection of the contracting parties, and with the sole intention and will of transferring and accepting, and upon the sight of the corporeal thing, in which those rights are inherent, and so as it were are possessed by a fiction of law, and he, who has been thus in possession by a fiction of law, always as it were enjoys it, until he has been disseysed through violence, or without violence, through non-user. For the possession of a corporeal thing may be acquired without the use of it, and similarly the feigned possession of an incorporeal thing without the use of it. But when the use has intervened in [the case of] an incorporeal thing, the possession is retained by use, and is made a true possession, which was formerly feigned, and when a person has enjoyed such a right, he may transfer the right to another, and the enjoyment also of it, which he could not before he had the enjoyment of it. Likewise if he, in whose favour a servitude has been instituted,

rights, liberties, and servitudes.

f. 53.

hæres ejus uti poterit, si servitus fuerit constituta sibi & hæredibus suis, & sic de hærede in hæredem, ꝑpinquos & remotos, ꝑ modum donationis. Si autem sic constituta fuerit servitus, tali & hæredibus suis, vel cui dare vel assignare voluerit, omnes tales per mod' constitutionis sive donationis admittuntur ad usum successivè, cùm sint quasi in possessione, & omnes alii ab usu penitus excluduntur. Hujusmodi autem jura, sicut servitutes, dici possunt pertinentiæ alicujus rei corporalis, & pertinent de re corporali ad rem corporalem, sc. de fundo, vel ne tenem̃ alieno ad fundum vel tenementū alicujus ꝑprium, & hoc multis modis, secundùm quod infrà dicetur pleniùs de assisis. Transferuntur autem hujusmodi jura de persona in personam, per usum & quasi ante usum, ut p̃dictū est. Item, sicut pertinet jura ad aliquem ex alieno, ita pertinent in ꝑprio, ut si quis fundum habuerit, ad quem pertinet advocatio ecclesiæ, jus præsentandi pertinebit ad dominum, & quamvis ecclesia, secundùm quod cōstruitur lignis & lapidibus, sit res corporalis, jus tamen presentandi erit incorporale, & unde aliud est dare ecclesiam, & aliud dare advocationem. Laici tamen, secundùm communem usum, propter eorum simplicitatem, dant ecclesias, q̃ nihil aliud est dicere, quā p̃sentare. Laicus igitur presentat ad ecclesiam vacantem, secundùm quod construitur ex lignis & lapidibus, ut p̃sentatus ecclesiam regat, & episcopus eam dat, sc. præsentatum admittit ad regimen & instituit. Si autem dominus fundi advocationem dederit, sc. illud jus ꝑsentandi, aliud erit. Si quis autē donationē fecerit viris religiosis, &

during his lifetime, when he was unwilling and unable, has not enjoyed it, his heir may enjoy it, if the servitude was instituted for himself and his heirs, and so from heir to heir, near and remote, by means of a donation. But if the servitude has been thus instituted, to such an one and to his heirs, or to whom he chooses to give or to assign it, all such persons are admitted through the mode of the institution, or of the donation, to the enjoyment successively, since they are as it were in possession, and all others are entirely excluded from the use of it. But rights of this kind, like servitudes, may be called appurtenances of a corporeal thing, and appertain by reason of one corporeal thing to another corporeal thing, for instance, by reason of an estate or tenement of another's to an estate or tenement of one's own, and this in various ways, as will be stated more fully in treating of assises. But rights of this kind are transferred from person to person, through use, and as it were before use, as has been stated above. Likewise, as rights appertain to a person in another person's estate, so they appertain to him in his own estate, as if a person has an estate, to which the advowson of a church appertains, the right of presentation will appertain to the lord, and although a church, according as it consists of wood and stone, is a corporeal thing, the right of presentation will be an incorporeal thing, and hence it is one thing to give the church, another to give the advowson. Laymen, however, according to common usage, on account of their simplicity, givethe churches, which is so to say nothing else than to present. A layman therefore presents to a vacant church, according as it is constructed of wood and stone, that his presentee may govern the church, and the bishop gives it, that is admits the presentee to the government, and institutes him. But if the lord of the estate gave the advowson, that is, the right of presenting, it would be different. But if any one has made a donation to a religious body and

dederit eis ecclesiam, ita, q illam habeant in ꝑprios usus, sic remanebit ecclesia illa imꝑpetuū, sed tamen jus advocationis ad illos nō transfertur, quia jus advotionis semꝑ remanet cum patrono, & unde illā ulteriùs cōferre nō poterunt alicui clerico, cū jus advocationis, & jus ꝑsentandi sēper remaneat cū patrono. Si autem dederit quis eis jus advocationis alicujus ecclesiæ, ipsi de gratia & dispensatione poterunt eam in ꝑprios usus retinere, vel ad eam ꝑsentare, & jus advocationis vel patronat⁹ sibi retinere. Habet tamen hujusmodi donatio ex consuetudine & ab usu aliā interpretationē, & alium intellectū, ut si dicat quis, Do talē ecclesiā talibus viris religiosis, ubi mentionem facere deberet de advocatione, sufficit donatio talis, quantū ad jus advocationis transferend, & ꝑpter simplicitatē laicorum interpretatur, quòd laicus per hæc verba dat quicquid juris habuit in ecclesia illa, s. jus advocationis, simul cum ecclesia illa, secundùm quod inveniri poterit de termino Sanctæ Trinitatis, anno regni regis Henrici
f. 53 b. quarto, in com̃ Lincolñ, de ecclesia de Wichine,[1] data priori de Markeby.

2. Qualiter quis uti debeat servitute in communi pasturâ.

Itē vidēdū qualiter quis uti debeat jure sibi concesso, ad retinēdā possessionē & juris sui declarationē, & primò de servitutib⁹, ut, si cui concedatur in alieno jus pascēdi, statī, cū possit, īmittit pecora sua, unū vel plura, & ꝑ hoc retinebit seysinā suā, unū dico, quia si ad plura usq; ad mille vel sine numero, sufficit ad seysinā retinēdā, si unicū immittat. Itē, si jus pascēdi ꝑ totū fund cōcedatur, sufficit ad seysinā retinēdā ꝑ totū

[1] "Wychine," MS. Rawl.; "Whickene," Crewe.

has given them the church, so that they should have it for their own use, such a church will remain so for ever, but nevertheless the right of advowson is not transferred to them, for the right of advowson always remains with the patron, and hence they cannot further confer it upon a clerk, since the right of advowson and the right of presentation always remains with the patron. But if any one has given them the right of advowson of any church, they may themselves of grace and of dispensation retain it for their own use, or present to it and retain for themselves the right of advowson and the right of presentation. But this kind of donation has of custom and of usage a different interpretation and a different understanding, as if any one should say, I give such a church to such a religious body, when he ought to make mention of the advowson, such a donation is sufficient, as regards the transfer of the right of advowson, and according to the simplicity of laymen it is interpreted, that a layman by these words gives whatever right he had in that church, that is, the right of advowson together with the church, according to what may be found in Holy Trinity term, in the fourth year of the reign of king Henry, in the county of Lincoln, f. 53 b.
respecting the church of Wichine, given to the prior of Markeby.

2. How a person ought to use a servitude in a common pasture.

Likewise we must see how a person ought to use a right conceded to himself in order to retain possession and to declare his own right, and first respecting servitudes, as if there be granted to any one in another person's land the right of pasturing, as soon as he can, he sends in his cattle, one or more, and thereby he will retain his seysine, I say one, because if he should send in more or as many as a thousand, or an innumerable body, it is sufficient to retain seysine, if he should send in a single one. Likewise if the right of pasturing throughout the entire estate be granted, it is sufficient to

fundꝺ, si unicū ĩmittat, eo animo, ut ꝑ totū pascat, ꝙ quidē, si ei ꝓmissū nō fuerit, ꝙ uti om̃o nō possit vel cōmodè, cōpetit ei assisa novæ diss. licèt anteà nō usus fuerit in veritate, ꝓpter quasi seysinā & quasi usum ex prima volūtate cōcedētis, & cū sic in veritate usus fuerit, illud jus cū usu trāsmittit ad hæredes suos & assignatos, ꝙ priùs facere potuit sine usu, & extunc ad extraneos illud jus transmittere poterit cum usu & seysina, ꝙ priùs facere non potuit sine usu. Et, ꝙ dict' est de jure pascendi, fiat de jure eūdi, agendi, aquāve ducendi, & de om̃ꝺ aliis servitutibus, q̃ sunt infinitæ & non refert.

3. Qualiter in jure præsentandi, et qualiter transfertur seysina.

De jure autē advocationis restat videre, qualiter trāsferatur, & q̃ debeāt concurrere ad hoc, ꝙ transferri possit. Oportet igitur ꝙ ille, qui advocationem dederit, in seysina sit p̃sentādi; hoc est ꝙ ultimò p̃sentaverit aliquē, qui ad p̃sentationē suā admissus fuerit & institutus, vel saltē cōmissa custodia, cū ꝑ hoc recognoscatur ipsum esse patroñ, vel saltē ꝙ p̃sentationē suam evicerit ab aliquo de seysina antecessoris, vel ꝙ antecessores sui p̃sentaverint ĩmediatè, vel aliquis nomine eor̃, vel nomine suo, sicut custos vel firmarius. Cū autē sic in seysina fuerit, jus advocationis ad alium transferre poterit, sed non solo animo & affectu, sicut servitutem, secund' quosdam. Cū jus advocationis incorporale sit, ꝙ videri non possit nec tangi, oportet de necessitate, ꝙ cùm corpore transferatur, ad quod ꝑtinere possit, quia sine corpore rectè possideri non possit,

retain seysine throughout the whole estate, if he sends in a single one, with the intention that it shall feed in every part, which, if it be not permitted to do, because either it cannot use it physically, or not conveniently, he is entitled to an assise of novel disseysine, although he has not before enjoyed seysine in truth, on account of a kind of seysine and a kind of use of it from the first willingness of the grantor, and when he has so used it in truth, he transmits that right with the use to his heirs and assigns, which he formerly could do without the use, and thenceforward he can transmit that right to strangers with the use and the seysine, which he formerly could not do without the use. And what has been said of the right of pasturing may be said of the right of footpath, or of carriage road, or of bringing water, or of all other servitudes, which are infinite and not worth enumerating.

3. How a person ought to use his right of presentation, and how seysine is transferred.

It remains to be seen respecting the right of advowson, how it is transferred, and what ought to concur to enable it to be transferred. It behoves, therefore, that he who has given the advowson, be in the seysine of the right to present, that is, that on the last occasion he has presented some one who was admitted to his presentation and was instituted, or at least the custody was committed to him, since by this it is recognised that he is the patron, or at least that he has recovered his presentation from some one upon the seysine of an ancestor, or because his ancestors have immediately presented, or some one in their name, or in his name, as a guardian or a farmer. But when he is thus in seysine, he may transfer the right of advowson to another, but not by intention and desire alone, as a servitude, according to some. Since a right of advowson is an incorporeal right, which cannot be seen nor touched, it behoves of necessity, that it be transferred with the body, to which it may appertain, for it cannot be properly possessed without a body, although it is said by

licèt ab aliquibus dicatur, quòd quasi ad similitudinem servitutis. Et quòd advocatio, q̃ incorporalis est, transferri non possit sine re corporali & teñto, p̄batur de termino Sancti H. anno regis H. nono, comitatu Norf. inter abbatem de Messendene & Huber̄ de Burgo, de ecclesia de Owalton,[1] ubi idem abbas protulit quandam chartam cujusdam Walteri de la Penne, q̃ testabatur, quòd idem Walterus dedit ei advocationem illius ecclesiæ, sed quia posteà convictum fuit, quòd idem Walterus nullum teñ̄ habuit in manerio, in quo ecclesia sita fuit, nec aliquis per eum, nec idem Walter. nunq̄ p̄sentavit ad ecclesiam illam; consideratum fuit, q̄ abbas nihil caperet. Item ad hoc facit q̄ habetis de termino Sancti Hilar. anno regis Henrici sexto, comitatu Staff., de Raul[2] comite Cestriæ & priore de Kenelwyde,[3] de ecclesia de Stoke, ubi dicitur, quòd ille, qui dedit advocationem priori, nec aliquis antecessorum suorum nunquam seysinam habuit præsentandi, nec aliquod tenem̃tum in villa illa, consideratum fuit quòd donatio illa nulla. Item, ad hoc facit, quod habetis de termino Paschæ, anno regis Hen. nono in comitatu Cornub. de Richardo de Wyks[4] & priore de Triwardrey, assisa ultimæ præsentationis de ecclesia de Wyks,[4] ubi non valuit donatio facta de advocatione, quia ille, qui dedit, nunquam fuit in seysina præsentandi, nec terram aliquam habuit in villa illa, ad q̄ advocatio illa potuit p̄tinere, q̃vis multæ confirmationes episcopoř & dñoř capitalium intervenissent.

Britton, l. ii. ch. ix. § 14.

Fleta, 204.

f. 54.

4. Quod advocatio ecclesiæ cum

Oportet igitur, q̄ advocatio cum re corporali transferatur cum seysina illi[5], cui trās̄fertur, vel alicuj[5] antecessoř suoř, & cū sic facta fuerit donatio advoca-

[1] "Owelton," MSS. Rawl. and Crewe.

[2] "Ranulph," MS. Rawl.; "Raul," MS. Crewe.

[3] "Kenylleworth," MSS. Rawl.; "Kyngworth," Crewe.

[4] "Wyke," Crewe.

some, that it may be, as it were [possessed] after the likeness of a servitude. And that an advowson, which is incorporeal, cannot be transferred without a corporeal thing and a tenement is proved [by a case] in St. Hilary's term, in the ninth year of king Henry, in the county of Norfolk, between the abbot of Messendene and Hubert de Burgh, respecting the church of Owalton, where the same abbot produced a certain charter of a certain Walter de la Penne, which witnessed, that the same Walter had given him the advowson of that church; but after it had been afterwards established, that the same Walter had no tenement in the manor, in which the church was situated, nor any one through him, and that the same Walter had never presented to that church, it was held that the abbot should take nothing. Likewise it makes for this, what you have in St. Hilary's term in the sixth year of king Henry in the county of Stafford, concerning Raoul, earl of Chester, and the prior of Kenelwyde, concerning the church of Stoke, where it is said, that neither he who gave the advowson to the prior, nor any of his ancestors, ever had seysine of the right to present, nor any tenement in that vill, it was held that the donation was null. Likewise it makes for this, what you have in Easter term, in the ninth year of King Henry, in the county of Cornwall, concerning Richard de Wyks and the prior of Trivardrey, in an assise of the last presentation of the church of Wyks, where the donation which had been made of the advowson did not avail because he, who gave it, never wasin seysine of the right to present, nor had any land in that vill, to which the advowson could pertain, although many confirmations of bishops and of chief lords had intervened. f. 54.

4. That the advowson of a church, when it is to be given,

It behoves, therefore, that an advowson be transferred with a corporeal thing accompanied by the seysine of him, to whom it is transferred, or of some of his ancestors, and when the donation of the advowson with

aliquo tenemento transferatur, quum dari debeat.

tionis cū teñto, facta traditione rei corporalis, viz. teñti, statī incipit donatorius possidere teñtū illud, & quasi possidere jus p̃sentandi; seysinā autē nunq̄ habebit, antequam ecclesia vacaverit, & tunc p̃sentare possit. Et unde si donatio facta fuerit tanī donatorio sine hæredib⁹ suis, si in vita sua vacaverit, p̃sentare poterit, & uti seysina sua. Si autē non, remanebit p̃sentatio cum donatore, vel si illā in vita sua dederit alicui, anteq̄ vacet, non valebit donatio, ex quo non fuit in seysina p̃sentandi, sed remanebit cū donatore. Si autem sic facta fuerit donatio, sibi & hæredibus suis, si in vita donatorii nō vacaverit, q̄ p̃sentare possit, jus tamen p̃sentandi transmittit ad hæredes suos p̄pinquos & remotos in infinitū, de seysina donatoris & warrāti sui, sicut de seysina alicuj⁹ antecessoris, & donatorius semper ex donatione est quasi in possessione, & videtur uti, donec seysinā amiserit p̄ nō usū, hoc est, si donatorē vel aliū ex negligentia vel patientia sua p̃sentare p̄miserit ad ecclesiā, cū vacaverit, quo casu nunq̄ recuperabit ipse, nec hæredes sui, quia vacua erit charta & donatio sine seysina. Si autē donatorius anteq̄ ecclesia illa vacaverit, vel anteq̄ p̃sentaverit, vel hæredes sui advocationē illā dederint alicui, cū teñto vel sine, non valebit donatio, quia quāvis jus p̃sentandi transferatur, tamē seysinā non transferunt, q̄ non habent, sed semp̄ remanebit cū donatore, qui ultimò p̃sentavit, nisi fortè sit ita, q̄ donatio facta sit donatorio & hæredibus suis, vel cuicunq̄ dare & assignare

the tenement has thus been made, upon the delivery of the corporeal thing, that is, of the tenement being made, the donatory forthwith begins to possess that tenement, and as it were to possess the right of presenting, but he will never have the seysine before the church has become vacant, and he may then be able to present. And hence, if the donation has been made only to the donatory without his heirs, if it has fallen vacant during his lifetime, he may present, and use his seysine. But if not, the presentation will remain with the donor, or if he has given it in his lifetime to any one before it is vacant, the donation will not be valid, since he was not in seysine of the right to present, but it will remain with the donor. But if the donation be thus made, "to him "and to his heirs," if it has not been vacant during the lifetime of the donatory, so that he may be able to present, he nevertheless transmits the right of presenting to his heirs, near and remote without end, from the seysine of the donor and his warrantor, as if from the seysine of an ancestor, and the donatory is always upon the donation as it were in possession and seems to use it, until he should lose the seysine from non-user, that is, if through his negligence or his sufferance he has permitted the donor or another to present to the church, when it has become vacant, in which case he will never, either himself or his heirs, recover it, because the charter will be void and the donation will be without seysine. But if the donatory, before that church has become vacant, or before he has presented, or if his heirs have given that advowson to any one, with a tenement or without, the donation will not be valid, for although the right of presenting is transferred, they do not transfer the seysine, because they do not possess it, but it will always remain with the donor, who last presented, unless by chance it be thus, that the donation has been made to the donatory and his heirs or to whomsoever he may choose to give or to assign it, on account of the mode of

should be transferred with some tenement.

voluerit, ꝑpter mod' donationis, quia donatorii & assignati erunt loco hæred'. Sed si cùm nulla facta sit mentio de assignatis, donatorius vel ejus hæredes dederint vel assignaverint anteq̃ seysinã habuerint, & donatorius vel ejus assignati,[1] cum ecclesia vacaverit, p̃sentaverit, & ꝑ negligentiã vel ꝑ patientiã primi donatorii admissus fuerit clericus ad eoꝝ p̃sentationem, sic incipient possidere ex negligentia vel patientia alioꝝ, & incipiet valere donatio, ex quo concurrunt jus & seysina, justè vel injustè. Sed quid si uterq̃ p̃sentaverit, primus donator viz., & secundus donatorꝰ ? primꝰ donator p̃ferri debet ꝑpter seysinam, à qua non recessit, nec secũdꝰ donator potuit ad aliũ plꝰ conferre quã ipse habuit, sc. nil nisi jus sine seysina, & licèt assignatꝰ ipsum vocare vellet ad warrantum, non possit ei plus warrantizare, quàm ei dedit vel dare potuit, neq̃ etiam potest eum defendere in seysina p̃sentationis, quam suus assignatus non habuit. Item esto, quòd ante seysinam præsentationis facta fuit donatio vel assignatio, & casu aliquo revertatur teñtum cum advocatione ad eum qui dedit, sicut eschaeta, vel alio modo, & inceperit ecclesia vacare tunc primò, & uterque præsentaverit, sc. primus donator & primus donatorius, adhuc erit præferendus in donatione primus donator, propter seysinam præsentandi, à qua non recessit, & si donatorius instrumenta donationis protulerit, vacua erunt, quantum ad jus præsentandi, quia quicquid habuit, suo feoffato contulit, & jam ex alia causa & ab
f. 54 b. alio possideri incepit de novo, quã ex prima causa donationis & à feoffatore suo.

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[1] "vel assignatus," MSS. Rawl. and Crewe.

the donation, because the donatories and the assigns will be in the place of heirs. But if, when there is no mention of assigns, the donatory or his heirs shall have given or assigned it before they have had seysine, and the donatory or his assigns, when the church has become vacant, have presented, and through the negligence or the sufferance of the first donatory a clerk has been admitted upon their presentation, they will thereby commence to possess from the negligence or the sufferance of others, and the donation will begin to be valid, from the time that right and seysine, rightfully or wrongfully, concur. But what if each has presented, the first donor for instance and the second donatory? The first donor ought to be preferred on account of the seysine, from which he has not withdrawn, nor could the second donatory confer upon another more right than he had himself, for instance, nothing but the right without the seysine; and although the person, to whom it has been assigned, would wish to call him to warrant, he cannot warrant more than he gave to him, or could give to him, nor can he defend him in the seysine of the presentation, which his assignee had not. Likewise let it be, that the donation or the assignment has been made before the seysine of the presentation, and by some casualty the tenement with the advowson reverts to him who gave it, as an escheat or in some other way, and the church has begun to be vacant then for the first time, and each has presented, that is, the first donor and the first donatory, the first donor will have still to be preferred in the donation, on account of the seysine of the presentation, from which he has not withdrawn, and if the donatory should produce the instruments of donation, they will be without effect, as regards the right of presentation, because whatever he had, he has conferred on his feoffee, and already it has begun to be possessed anew by another from another cause, than f. 54 b.
from the first cause of the donation and from his feoffor.

5. Quod donatio de advocatione valere non debet, antequam donator fuerit in possessione præsentandi.

Et q donatio facta de advocatione valere non debeat, antequā donator fuerit in possessione p̃sentādi, p̃batur in rotulo, de term̃ Sācti M. anno reg. H. octavo, incipiēte nono in com̃ Bed. de Johanne de Trahilz & priore de Niwēhā,[1] assisa ultimæ p̃sentationis, de tertia parte ecclesiæ de Sudmels, ubi prior respondit ad assisam, q Walterus de Trahilz, antecessor p̃dicti Johannis, dedit advocationem illius tertiæ partis Falkz de Bureflute, & ille Falkz, illam dedit domui suæ per chartā suā, sed quia idē prior recognovit q idē Walterus fecit ultimam p̃sentationē, & q Falkz nunquā p̃sentavit, cōsideratū fuit, q Johannes recuperaret seysinam suā de seysina Walteri antecessoris sui. Itē ad hoc facit, q habetis de itinere M. de Pateshull in com̃ Wygorn̄, anno regis Hen. quinto; ubi dicitur, quòd si ille, cui data fuerit advocatio, vel donatorius, antequam præsentaverit, illam ulteriùs donaverit, non valebit donatio, quia ultimus donatorius warrantum non habuit. Item non valet donatio advocationis, si ille, qui dedit, nunquam habuit seysinam præsentandi, nec aliquid de manerio, vel tenemento, ad quod advocatio pertinuit, ut inter placita quæ sequuntur regem, anno regni regis Hen. tertii[2] vicesimo secundo in com̃ Salop. de Godfrido de Gamages, ubi idem Godfridus dixit corā rege, q quidā antecessor suus dedit patri suo quandā terrā cū advocatione ecclesiæ, & inde postmod' convictū fuit, q idem antecessor nunquā seysinā inde habuit, & ideo donatio nulla, licèt idē Godfridus & pater suus postmod' inde essent in seysina. Itē ad hoc facit, de term̃ Paschæ anno regni reg. H. decimo in com̃ Leyc. assisa

[1] "priore de Newenham," MS. Rawl. | [2] "tertii," omitted M.S. Rawl.

5. That the donation of the advowson of a church ought not to be valid, before the donor has been in the possession of the presentation.

And that the donation of an advowson ought not to be valid, if made before the donor is in possession of the presentation, is proved in the roll of the term of St. Michael, in the eighth and ninth years of king Henry, in the county of Bedford, concerning John de Trahilz and the prior of Niwenham, in an assise of Last Presentation, respecting the third part of the church of Sudmels, when the prior made answer to the assise, that Walter de Trahilz, an ancestor of the aforesaid John, gave the advowson of that third part to Falkz de Bureflute, and the said Falks gave it to his house by his charter, but because the same prior acknowledged that the same Walter made the last presentation, and that Falkz never presented, it was held, that John should recover his seysine upon the seysine of Walter his ancestor. Likewise it makes for this what you have in the iter of Martin de Pateshull, in the county of Worcester, in the fifth year of king Henry, where it is said that if he, to whom the advowson has been given, or the donatory, before he has presented, shall have further given it, the donation will not be valid, because the last donatory had no warrantor. Likewise the donation of an advowson is not valid, if he who gave it never had seysine of the presentation, nor anything from the manor or from the tenement, to which the advowson belonged, as amongst the pleas which follow the crown, in the twenty-second year of the reign of king Henry the third, in the county of Salop, concerning Godfridus de Gamages, where the said Godfridus said in the presence of the king, that a certain ancestor of his gave to his father a certain land with the advowson of the church, and thereupon it was afterwards proved, that the same ancestor never had seysine of it, and therefore the donation was null, although the same Godfridus and his father were afterwards in seysine of it. Likewise this is supported by a case in Easter term in the tenth year of the reign of king Henry, in the county of Leicester,

ultimæ præsentationis, inter Walteř de Rideware, & priorem de Undeleigh, ubi id' Walterus nil capere potuit per assisam, quia comes de Ferrariis, qui maneriū illud, ad q̄ advocatio illa p̄tinuit, dedit p̃dicto Waltero, nunquā p̃sentavit ad ecclesiā illā. Item ad hoc facit, quod habetis de termino Sancti M. anno reg. H. nono incipiente decimo, assisa ultimæ præsentationis, inter priorē de Lewes, & de novo mercato,[1] de ecclesia de Hatfelt, ubi idem Adam recuperavit præsentationem suam de seysina avi sui ex parte matris. Casus quidem talis est. Avus quidā ipsius Adæ, &c. De hac materia habebitis pleniùs infrà, de assisa ultimæ p̃sentationis, & hic supabundat vel ibi. Item videtur, quòd sine corpore poterit jus advocationis transferri ad alium p̄ se, & quasi possideri, sicut servitus, donec vacaverit. & tunc p̄ usum & præsentationem retineri, ad similitudinem servitutis, non est enī necesse, ut videtur, q̄ semp̄ adhæreat fundo vel teñto, cui insit, cū inesse poterit ecclesiæ, secund' q̄ ecclesia construitur ex lignis & lapidib[9], & unde dicitur advocatio talis ecclesiæ, & unde, si ecclesia donetur sine teñto, adhuc poterit transferri advocatio vel retineri, & cū p̄ se data fuerit advocatio, &, cùm ecclesia vacaverit, donatorius p̃sentaverit, & jus advocationis retinebit per seysinam, & sic desinet esse advocatio de fundi pertinentiis. Et unde videtur, quòd, si ille, qui advocationem dedit sive ante vacationem ecclesiæ, sive post, fund' dederit cū omnibus p̄tinentiis suis, & cum advocatione ecclesiæ expressè, non valebit donatio, quantum ad advocatio-

[1] "Adam de novo mercatu," MSS. Rawl. and Crewe.

in an assise of Last Presentation, between Walter de Rideware and the prior of Undeleigh, where the same Walter could obtain nothing by the assise, because the earl of Ferrers, who gave to the aforesaid Walter the manor, to which that advowson appertained, never presented to that church. Likewise this is supported by what you have in the term of St. Michael, in the ninth and tenth years of king Henry, in an assise of Last Presentation, between the prior of Lewes and [Adam] of New Market, respecting the church of Harfelt, where the same Adam recovered his presentation upon the seysine of his grandfather by the mother's side. The case was thus. A certain grandfather of Adam himself, &c. Of this matter you will have more fully below, in the chapter concerning an assise of Last Presentation, and here it is superabundant or there. Likewise it seems that the right of advowson may be transferred without any corporeal thing to another by itself, and be as it were possessed, like a servitude, until it is vacant, and then be retained by use and presentation, after the likeness of a servitude, for it is not necessary, as it seems, that it should always adhere to an estate or to a tenement, in which it is [vested], since it may be [vested] in a church, according as the church is constructed of wood and stones, and hence it is called the advowson of such a church, and hence, if the church be given without the tenement, the advowson may still be transferred or retained, and when the advowson has been given by itself, and upon the church being vacant the donatory has presented, he will retain both the right of advowson by the seysine of it, and the advowson will also cease to be of the appurtenances of the estate. And hence it seems, that if he, who has given the advowson either before or after the vacancy of the church, has given the estate with all its appurtenances, and expressly with the advowson of the church, the donation will not be valid as regards the advowson, although it may be valid as

nem, licèt valeat quantum ad fundū, transferendo sine
f. 55. advocatione, quia donator id, q̄ pri⁹ dedit, sine volū-
tate donatorii resumere non poterit, nec iteř dare, licèt
videatur prima facie, q̄ semp in seysina extiterit, donec
donatori⁹ p̃sentaverit. Sed revera dare non poterit,
cùm donatorius jus non habeat p̃sentandi & sit quasi
in seysina, donec ecclesia vacaverit, & sic p̄ imaginariā
seysinā, remanet vera seysina in suspenso usq̄ vacatio
nē ecclesiæ, & tunc p̃sentet donatorius, si advocationē
ad aliū non transtulerit, vel donator, si hoc nō fecerit,
& sic erit observanď, ubi advocatio separata est à
fundo, & non est de fundi p̄tinentiis. Itē esto, q̄ de
fundo fiat donatio cum advocatione, & anteq̄ ecclesia
vacaverit, vel post, fuerit donatorius per donatorē vel
p̄ aliū disseysitus, & tunc vacare incipiat ecclesia, non
p̃sentabit donatorius ad ecclesiā, cujus advocatio est de
p̄tinentiis, anteq̄ fund̄ recuperet, q̄ est principale, & sic
agi oportet in pluribus casib⁹, q̄ seysinam habere nonpo-
terit quis de pertinentiis vel accessorio, anteq̄ acquisierit
principale. Itē quandoq̄ trāsit jus advocationis cū cor-
pore, i. cū ipso fundo, vel teñto, ad q̄ advocatio p̄tinue-
Britton, l. ii. ch. ix. § 15. Fleta,'204 rit, quādoq̄ cū expressione & quādoq̄ sine ; cū expressione,
ut si dicatur, do tibi fund̄ istū cum omnibus p̄tinentiis
suis & cum advocatione ecclesiæ, vel sine expressione,
ut si dicatur, do tibi fundum istū cum om̄ib⁹ p̄tinentiis
suis, sine aliquo retento, sive hoc sit in feodo, vel ad
firmā, in quo casu transit advocatio cum ipso fundo ad
donatorium, & si partē fundi dederit, quāvis cum om̃b⁹
p̄tinentiis suis, & partē retinuerit, nō p̄pter hoc trās-

regards the estate in transferring it without the advowson, because the donor cannot resume what he has previously given without the willingness of the donatory, nor give it a second time, although he may appear to be always in seysine, until the donatory has presented. But in truth he cannot give, since the donatory has not the right of presenting and is as it were in seysine, until the church has become vacant, and so by an imaginary seysine, the true seysine is in suspense until the vacancy of the church; and then let the donatory present, if he has not transferred the advowson to another, or the donor, if he has not done this, and so it will have to be observed, where the advowson is separated from the estate, and is not of the appurtenances to the estate. Likewise, let it be, that a donation be made of an estate with the advowson, and before or after the church has become vacant, the donatory has been disseysed [of the estate] by the donor or by another, and then the church begins to be vacant, the donatory shall not present to the church, of which the advowson is one of the appurtenances [to the estate], before he recover the estate, which is the principal thing, and so it ought to be done in several cases, that a person cannot have seysine of the appurtenances or of an accessory, before he has acquired the principal. Likewise sometimes the right of advowson passes with the body, that is, with the estate itself or tenement, to which the advowson pertains, sometimes with an expression, and sometimes without; with an expression, as if it be said, "I give you that es- f. 55.
" tate with all its appurtenances and with the advowson
" of the church," or without an expression, as if it be said, "I give you that estate with all its appurtenances,
" without any kept back, whether it be in fee or to
" farm," in which case the advowson passes with the farm itself to the donatory, and if he has given a part of the estate, although with all its appurtenances, and has retained a part, the advowson is not on that account

fertur advocatio, sed cum donatore remanebit, licèt minimā partē fundi retinuerit, non enī transfertur advocatio cum aliqua parte fundi, nisi specialiter transferatur. Itē si pluribus fiat donatio de fundo aliquo, p particulas cum oīb⁹ ptinētiis simul, vel successivè sine aliqua exp̃ssione advocationis, ultimò feoffatus, quantum ad jus advocationis, erit omnibus aliis præferendus, habita tamen distinctione secundùm quosdam, si advōcatio specialiter excipiatur: utrum donator sic dicat, do tibi tantam terram cum omnibus pertinentiis suis, excepto tanto terræ de p̃dicta terra cum pertinentiis, vel, retento mihi tanto terræ de eadem terra; quia in primo casu videtur excipi ab illo, q donator totum transferat ad donatorium, scilicet advocationem cum omnibus aliis pertinentiis, & unde cùm posteà ab illo toto excipiat partem, videtur, q advocatio remanere debeat donatori, ex quo cum parte specialiter excepta non transfertur. Si autem sic dicat, do tibi tantam terram cum omnibus pertinentiis suis, salva mihi vel retenta tali parte, videtur quòd advocatio remanere debeat cum parte retenta vel salvata. Item esto, quòd alicui fiat donatio de tenemento cum advocatione, donec ei provideatur, si ante provisionem, & antequam in seysina fuerit præsentandi, donatorius rem cum advocatione, vel advocationem per se, etiam post præsentationem ad alium transtulerit, qui similiter præsentaverit ante provisionem, & posteà donatorio provisum fuerit, & iterum ecclesiam vacare contigerit, & omnes præsentaverint, scilicet donator primus, & donatorius primus & secundus, donator primus erit aliis omnibus præferendus, quia, si primus donatorius & secundus

transferred, but will remain with the donor, although he has retained the smallest part of the estate, for the advowson is not transferred with any part of the estate, unless it be specially transferred. Likewise if a donation be made of any estate to several persons by lots, with all the appurtenances simultaneously or successively, without any expression of the advowson, the last feoffee, as far as regards the right of advowson, is entitled to be preferred to all the others, a distinction however being made according to some, if the advowson be specially excepted: whether the donor says thus, I give you so much land with all its appurtenances, with the exception of so much land of the aforesaid land with its appurtenances, or in retaining for myself so much land of the same land, because in the first case there seems to be an exception from that which the donor wholly transfers to the donatory, namely, the advowson with all other appurtenances, and hence when afterwards he excepts a part from that whole, it seems that the advowson ought to remain with the donor, on the ground that, together with the part specially excepted, it is not transferred. But if I say thus, I give you so much land with all its appurtenances, reserving to myself or retaining such a part, it appears that the advowson ought to remain with the part reserved or retained. Likewise let it be, that a donation be made to any one of a tenement with an advowson, until it be provided for, if before the provision of it, and before he has been in seysine of the presentation, the donatory has transferred the tenement with the advowson, or the advowson by itself, after presentation to another, who has similarly presented it before the provision of it, and it has been afterwards provided for by the donatory, and it has happened a second time to become vacant, and all have presented, the first donor and the first donatory and the second donatory, the first donor will have to be preferred to all the others, because if the first

prima facie actionem habeant de p̃sentatione, donator
f. 55 b. habebit exceptionem de p̃visione, & nō poterit prim⁹ donatori⁹ dare ad remanentiā vel cū effectu, quia ppetuitatē nō habet, vel quia ejus stat⁹ depēdet ex insidiis fortunæ. De hac materia inveniri poterit, de t̃mino Paschæ anno reg. Hen. septimo in com̃ Bed. de Falkz de Briāte, & priore de Nywēhā,[1] assisa ultimæ p̃sentationis de ecclesia de Haspele.

Cap. XXIV.

1. De libertatibus, quis eas dare possit, et quæ sunt regis.

Dictū est supra, qualiter jura & res incorporales transferūtur, & qualiter tradūtur, vel quasi, & qualiter possidētur, vel quasi, & qualiter p̃ veř usum retinētur; nūc autē dicēd' erit de libertatib⁹, quis cōcedere possit libertates, & quib⁹, & qualiter trāsferuntur, & qualiter possidentur vel quasi, & qualiter p̃ usum retinētur. Quis? Et sciend', q̃ ipse dñs rex, qui ordinariam habet jurisdictionē & dignitatē & potestatē sup̃ om̃s, qui in regno suo sunt, habet enī om̃a jura in manu sua, q̃ ad coronā & laicalē p̃tinēt potestatē & materialē gladiū, qui p̃tinet ad regni gubernaculū, habet etiā justitiā, & judiciū, q̃ sunt jurisdictiones, ut ex jurisdictione sua, sicut Dei minister & vicarius, tribuat unicuiq̃ qd' suū fuerit. Habet etiā ea q̃ sunt pacis, ut popul⁹ sibi traditus in pace sileat & quiescat, & ne quis alteř verberet, vulneret vel malè tractet, ne quis alienā rē p̃ vim & roberiā auferat vel asportet, ne quis hominē mahemiat vel occidat. Habet etiā coertionē, ut delin-

[1] "Newenham" in MS. Rawl.

donatory and the second have a primâ facie action upon the presentation, the donor will have an exception upon the provision, and the first donatory cannot give as remainder man or with effect, because he has not the perpetual estate, or because his *status* depends upon the snares of fortune. On this subject [a case] will be found in Easter term in the seventh year of king Henry, in the county of Bedford, concerning Falkz de Briante and the prior of Nywenham, in an assise of last presentation respecting the church of Haspele. f. 55 b.

Chapter XXIV.

1. Of liberties, who may give them, and which are the king's.

It has been said above in what way rights and incorporeal things are transferred, and how they are delivered, or as it were delivered, and how they are possessed or as it were possessed, and how they are retained by true use; now indeed we must discuss concerning liberties, who may concede liberties and to whom, and in what way they are transferred, and in what way they are possessed or as it were possessed, and how they are retained through use. Who? And it is to be known that the lord king himself, who has ordinary jurisdiction and dignity and power over all, who are in his realm, for he has all rights in his hand, which regard the crown and the lay power and the material sword, which pertains to the government of the realm; he has likewise justice and judgment, which are jurisdictions, that of his own jurisdiction, as the minister and vicar of God, he may award to each what is his own. He has likewise those things which are the attributes of peace, that the people entrusted to him may be silent and quiet in peace, and that no one may beat nor wound nor maltreat another, that no one may take away or carry off the goods of another by force or robbery, that no one may maim nor slay a man. He has likewise coercive power that he may punish and coerce delin-

quētes puniat & coerceat. Item habet in potestate sua leges, & constitutiones, & assisas in regno suo ꝑvisas & approbatas, & juratas, ipse in ꝑpria ꝑsona sua observet, & à subditis suis faciat observari. Nihil enim ꝑdest jura condere, nisi sit, qui jura tueatur.

Inst. II. t. i. § 18. Britton, l. i. ch. ii. § 17. Fleta, 38.

Habet igitur rex hujusmodi jura sive jurisdictiones in manu sua. Habet etiā ꝑ cæteris oīmib⁹ in regno suo, de jure gentium, privilegia ꝑpria, q̃ de jure naturali esse deberent inventoris, sicut thesaurus, wreccum maris, crassus piscis, sturgio, wayvium, q̃ in nulli⁹ bonis esse dicūtur. Habet etiā de jure gentiū in manu sua, q̃ de jure naturali deberent esse cōmunia, sicut feras bestias & aves non domesticas, q̃ deberent esse cōmunia de jure naturali, & per apꝑhensionē, & captionē, & aucupationē ꝑpria. Itē per occupationem & apꝑhēsionem rei alteri⁹, ut si quid abjiciatur & ꝑ derelicto habeatur. Ea vero, q̃ jurisdictionis sunt & pacis, & ea, q̃ sunt justitiæ & paci annexa, ad nullū pertinent, nisi ad coronā & dignitatem regiā, nec à corona separari poterunt, cū faciāt ipsam coronā.

2. Quid est corona regis.

Est enī corona regis facere justitiā & judicium, & tenere pacē, & sine quib⁹, corona cōsistere nō potest, nec tenere. Hujusmodi autem jura sive jurisdictiones ad personas vel teñta transferri nō poterūt, nec à privata persona possideri, nec usus nec executio juris, nisi hoc datum fuerit ei de super, sicut jurisdictio delegata non delegari poterit, quin ordinaria remaneat cum ipso rege. Ea vero, q̃ dicuntur privilegia, licèt pertineant ad coronam, tamen à corona separari possunt & ad privatas personas transferri, sed de gratia ipsius regis speciali; cujus gratia & concessio specialis, si non intervenerint, tempus à tali petitione regē nō

§ 56.

quents. He has likewise in his power laws and constitutions and assises in his realm, provided and approved, and sworn, that he will himself observe them in his own person, and will cause them to be observed by his subjects. For it is of no use to make laws, unless there is some one to maintain them. The king has therefore in his hand rights and jurisdictions of this kind. He has likewise in preference to all others in his kingdom, according to the law of nations, peculiar privileges, as treasure-trove, wreck of the sea, large fish, sturgeon, waifs, which are said to be nobody's property. He has likewise, according to the law of nations, the things, which of natural right ought to be common, such as wild beasts and birds not domesticated, which ought to be common of natural right, and are appropriated by seizure and by capture and by chasing. Likewise by the occupation and apprehension of the goods of another, as if a thing be cast away or left as abandoned. But those things, which are of jurisdiction and of peace, and those things, which are annexed to justice and to peace, pertain to nobody unless to the crown and to the royal dignity, nor can they be separated from the crown, since they constitute the crown itself.

2. What is the king's crown.

For the crown of the king is to do justice and judgment, and to maintain peace, and without which the crown cannot consist nor hold. But rights and jurisdictions of this kind cannot be transferred to persons or to tenements, nor be possessed by a private person, nor can the use nor the execution of right, unless it be given from above, as delegated jurisdiction cannot be delegated, but ordinary jurisdiction remains with the crown. Those things, however, which are called privileges, although they pertain to the crown, may nevertheless be separated from the crown and be transferred to private persons, but only with the special grace of the king; whose grace and special grant if they have not intervened, time does not exclude the king from such a f. 56.

excludit. Nullū enī tēp^{o} currit donationi regis, vel cōtra eū in hoc casu, cū ꝑbatione nō egeat. Cōstare enī debet oīb^{o}, q hujusmodi ꝑtinent ad coronā, nisi sit aliquis qui docere possit, ex speciali gratia habita, cōtrariū. In aliis verò, ubi ꝑbatio necessaria fuerit, currit tēp^{o} cōtra ipsū; sicut cōtra quoscūq, alios. Hujusmodi autē libertates, cū à rege cōcessæ fuerint, statī quasi trāsferūtur, & quasi possidētur, & ille, cui cōcedūtur, statī quasi utitur, licèt cas^{o}, quo uti debeat, statī nō evenerit. Cū autē evenerit, & usus fuerit, statī retinet possessionem per usum, & sive usus fuerit verè sive nō, semper erit in possessione vel quasi, vel jurisdictionis delegatæ vel rei, donec amiserit ꝑ abusū, vel nō usum. Uti autē nō poterit quis verè, licèt quasi, tali libertate, donec casus evenerit, quo uti possit, ut si quis habeat curiā & potestatem placitādi in curia sua placita vetiti namii, & tenēdi placitū ꝑ breve de recto, licèt sit quasi in possessione, tamen verè uti non poterit, ante brevis impetrationē & summonitionē. Itē, si cui cōcedatur libertas, q inquirere possit & judicare de assisis & mēsuris infractis cōtra cōstitutionē regiā, licèt possit inquirere, tamen judicare nō poterit, antequā fuerit trāsgressū, licèt fuerit quasi in possessione. Itē si cui cōcedatur talis libertas, q habeat soke & sake, toll & them, infangthef & utfangthef.[1]

3. De warennis et libertatibus concessis a domino

Judiciū vitæ & membroř, & furcas & alia q̃ ꝑtinent ad executionem judicii, talis nō priùs uti poterit tali libertate, antequā latro captus fuerit, de quo judiciū fieri possit & debeat, sed semꝑ priùs quasi utitur, cùm

[1] Infangenethef et Utfangenethef, MS. Rawl.

claim ; for no time runs against a donation of the king's or contrary to it in this case, since it requires no proof. For it ought to be clear to every person that things of this kind pertain to the crown, unless there be some one who can show the contrary from some special favour received. But in other things, where proof is necessary, time runs against the king himself, as against any others. But this kind of liberties, when they have been granted by the king, are as it were forthwith transferred, and as it were possessed, and he, to whom they are granted, forthwith as it were uses them, although the case, in which he ought to use them, has not forthwith happened. But when it has happened, and he has used them, he immediately retains possession by use, and whether he has really used it or not, he will always be or as it were be in possession either of the delegated jurisdiction or of the thing, until he has lost it from abuse or from non-user. But a person cannot really use, although he may as it were use, such a liberty, until the case arrives in which he can use it, as if a person has a court and a power of holding pleas in his court, pleas of forbidden distress and pleas of tenancy by a writ of right, although he be as it were in possession, nevertheless he cannot truly use it before the taking out the writ and the summons. Likewise if the liberty be granted to one, that he may inquire and judge of assises and measures infringed contrary to the royal constitution, although he may inquire, nevertheless he may not judge before it has been transgressed, although he may have been as it were in possession. Likewise if there be granted to any one such a liberty, that he may have soke and sake, toll and them, infangthef and utfangthef.

3. Of warrens and liberties granted by the lord the king, how

[As regards] judgment of life or limb, and the gallows, and other things which pertain to the execution of a judgment, such a person cannot use such a liberty before a robber has been captured, respecting whom a judgment may and ought to be made, but he always as it were

rege, qualiter possidentur et utantur.

sit in potestate utendi tali libertate, donec illā libertatem amiserit per non usum; hoc est donec alius de latrone capto infra libertatē suā justitiā fecerit & judicium, & illum abduxerit extra libertatem suā, semel seysiendo, per negligentiā & patientiā suā, eo p̃sente & sciente, & p̃mittente. Cùm autem hoc sciverit, & diligenter & recenter sibi p̃quisiverit, repetere poterit libertatē suā. Si autē negligens fuerit, & p̃ negligentiā & patientiā p̃ lapsū tēporis illā amittit, & extūc sine rege restitui non poterit, cū p̃ lapsū tēporis suā amiserit actionem. Item eod' modo, si cui cōcedaī talis libertas, q̃ quiet⁹ sit de theolonio & cōsuetudinib⁹ dādis p̃ totū regñ Angliæ, in terra & in mari, & q̃ theoloniū & cōsuetudines capiat infra libertatem suā de ementib⁹ & vendentib⁹, statī erit quasi in possessione, & possessionem retinebit, cùm tolnetū[1] & cōsuetudines receperit, & cū alibi in regno, extra libertatem suā, p̃ talem libertatem p̃textu talis libertatis, p̃ judicium, vel alio modo habuerit quietantiā in nūdinis & mercatis. Et q̃ hic dictum est exempli causa, dici poterit in oīmib⁹ aliis cōmunib⁹ casibus consimilib⁹, sicut in iis, q̃ p̃tinent ad coronā, sicut in placito de vetito namii, de visu frāciplegii. Itē de privilegiis supradictis. Est enī libertas evacuatio servitutis, & contrario modo sese respiciunt, & ideò simul non morātur. Esse enī poterit libertas, ut si quis teneatur ad dand' ex servitute, sicut theolonium & consuetudines, ex libertate defendi poterit ad nō dandum. Item si ex servitute teneatur quis ad non capiendum, ex libertate concessa capere possit consuetudines & theolonia.

[1] Theolonium in MS. Rawl.

uses such a liberty, since he has the power to use it, until he shall have lost such a liberty by non-user; that is, until some one else has exercised justice and judgment on a robber captured within his liberty, and shall have led him away beyond his liberty by men seizing him through his negligence and sufferance, when he was present and knowing and permitting it. But when he has once known it, and diligently and recently claims it for himself, he may reclaim his own liberty. But if he shall have been negligent, through negligence and sufferance he loses it from lapse of time, and thenceforward it cannot be restored without the king, since from lapse of time he has lost his action. Likewise in the same manner, if there be such a liberty granted to any one, that he shall be exempt from tolls and custom dues through the whole realm of England, on land and on sea, and that he may levy tolls and customs within his liberty upon all persons buying and selling, he will be forthwith as it were in possession [of the liberty], and he will retain possession, when he has levied tolls and customs, and when elsewhere in the realm, beyond his liberty, through such a liberty or under pretext of such a liberty, by a judgment or in any other way, he has had an acquittance in fairs and in markets. And what is said here for the sake of example, may be said in all other common similar cases, as in those which pertain to the crown, as in a plea of forbidden distress, of a view of frankpledge. Likewise concerning the aforesaid privileges. For a liberty is an evacuation of a servitude, and they regard each other as contraries, and therefore they do not remain together. For a liberty may be, as if a person were bound to give something as a servitude, as, for instance, tolls and customs, he may on the ground of a liberty be exempted from giving them at all. Likewise if on the grounds of a servitude he is bound not to take, in consequence of the grant of a liberty he may take customs and tolls. Likewise, if a person may

they are possessed and enjoyed.

Item si quis ex causa venandi vel aucupandi ingredi possit fundum alienum, ex servitute fundo imposita per negligentiam vel patientiam dominorum, ex libertate concessa prohiberi poterit, ne ingrediatur, Itē, si ex servitute vel quasi ingrediantur ballivi fundum alicuj°, sicut vic. & serviētes regis, ex libertate à rege cōcessa a rege ꝑhibeātur, ne ingrediātur, sed, ut ꝑ dñm libertatis summonitiones fiāt, & attachiamēta, & visus frāci plegii, & oña alia, q̄ ꝑtinent ad coronam. Cùm autē dñs rex ita libertates cōcesserit, sicut p̄dictum est, illas cōcedere non debet in præjudicium aliorum, ut, si priùs fortè alicui concessit talem libertatem, q̄ habeat warrenniam per totā terrā suā, & totum fund' suum, si postmodum illud idem concedat alteri infra eandē libertatem, injuriatur & detrahit libertati priùs concessæ, qua fortè usus est quis ꝑ multa tēpora, & q̄ semel dederit, sine juris injuria resumere non poterit, nec aliis dare, & maximè de quo ipse in seysina non fuerit, quod si fecerit de facto, & cùm charta libertatis publicè lacte[1] fuerit & audita, & cùm uti inceperit donatorius, impeditus fuerit per illum, qui primā habuerit libertatem, absq̄ eo, q̄ hoc priùs domino regi ostenderit, q̄ factum suum, q̄ magis voluntarium est quàm justum, revocet & emendet, amittere poterit imperpetuum, eo, q̄ factū domini regis ꝓpria authoritate impedit, & ei resistit, cùm hoc non liceat alicui, nec ētiam, quod magis est, de facto suo disputare, ut de abbate Sancti Albani & Galfrido de Chyldwike,[2] apud Westm̄ coram ipso domino rege, ubi idem Galfridus warrennam suam retinuit, quia idem abbas, absque eo, quòd hoc ostenderit domino regi, ipsum uti

f. 56 b.

[1] "lecta," MS. Rawl.

[2] Chyldewyke, Rawl.

enter another person's estate in order to hunt or to hawk on the ground of a servitude imposed upon the estate through the negligence or sufferance of the lords, he may be prohibited from entering on the estate in consequence of a liberty granted to the owner. Likewise if from a servitude, or as it were a servitude, the bailiffs enter any one's estate, as for instance the sheriff or the king's serjeants, upon a liberty granted by the king, they may be prohibited by the king from entering, nevertheless by the gift of the liberty summons may be made and attachments and views of frankpledge, and all other things which pertain unto the crown. But when the lord the king has granted such liberties, as aforesaid, he ought not to grant them to the prejudice of others, as if by chance he has previously granted to any one such a liberty, that he should have a warren over all his land and over all his estate, and afterwards should grant to another the same thing within the same liberty, he does injury to and detracts from the liberty previously granted, which a person may have enjoyed for a long time, and what he has once granted, he cannot resume and give to another without injury to right, and particularly in the case of a thing of which he was not in seysine; which, if he have done as a matter of fact, and when the charter of the liberty has been read and heard, and when the donatory has begun to use it, he has been impeded by him, who had the first liberty, without his showing this first of all to the king, that he may revoke and amend his act, which is more wilful than just, he may lose it for ever, because of his own authority he has impeded an act of the lord the king and resists him, which it is not lawful for any one to do, nor even, what is more, to dispute his act, as in the case of the abbot of St. Alban's and Galfrid de Chyldwike at Westminster, before the king himself, when the said Galfrid retained his warren, because the said abbot impeded him in using it without having previously re- f. 56 b.

impedivit. Item nec mutare poterit idem rex de jure libertatem priùs concessam, ut si dominus rex tenenti suo concesserit talem libertatem, quòd nullus vic. vel ballivus ingressum habeat in terram suam vel feodum suum, ad aliquam summonitionem, vel attachiamentum, vel districtionem p̄ servitio faciendo, si servitiū tenentis sui alicui attornaverit & concesserit, talis returna[1] breviū non habebit contra libertatem priùs concessā tenenti suo, qui returna[1] habuerit priùs, ut cogatur returna[1] recipere p̄ mediā personā, q̄ priùs recepit sine medio p̄ manus vicecom̄ vel ballivorum. Et quia nō poterit quis servitium tenentis sui ita atturnare alicui ad damnū ipsi[9] vel gravamē, & hoc verum est, nisi hoc p̄venerit ex voluntate tenentis, vel per negligentiā vel patientiā longā. Itē esto, q̄ dn̄s rex duobus concesserit aliquā libertatē, ut si alicui universitati, sicut civibus vel burgensibus vel aliquib[9] aliis, q̄ mercatum habeant vel feriā in villa sua, civitate, vel burgo, vel consuetudines capiat, & theolonia, & quieti sunt per totū regn̄ suū in terra & in mari de theolonio dando vel aliqua alia consuetudine, si postmodum concedat consimilem libertatem aliquibus in regno suo, quòd capiant & quieti sint, secundùm quod prædictum est, videndum erit, qui illorum præferri debeant in tali libertate, cùm quibusdam concessum sit, quòd theolonia capiant & consuetudines, & aliis, ne dent, quod quidem simul stare non poterit. Recurrendum igitur erit de necessitate ad prioritatem impetrationis, si nullus eorum usus fuerit, sed quasi. Si autem unus eorum usus fuerit, ita quòd ab aliis ceperit theolonium & consuetudines, in villa, & mercato, vel nundinis, & quòd quietantiam habuit in villa, mercato vel nundinis, talis præferri debet, propter usum, & retinere, cùm

[1] retorna, MS. Rawl.

presented it to the king. Likewise the said king cannot change of right a liberty previously granted, as if the king has granted to his tenant such a liberty, that no sheriff nor bailiff shall enter on his land or on his fee to make any summons or attachment or distress for a service, if he has attourned or granted the service of his tenant to any one, such a person shall not have the return of writs against the liberty previously granted to his tenant, who had the return previously, that he should be compelled to receive the return through an intermediate person, which he formerly received without an intermediary by the hands of the sheriffs or of the bailiffs. And because a person cannot so attourn the service of his tenant to any one to his loss or to his grievance, and this is true, unless this has happened with the willingness of the tenant or through negligence and long sufferance. Likewise let it be, that the lord the king has granted to two persons a certain liberty, as to a corporation, as for instance to citizens or burgesses or to certain others that they may have a market or a fair in their vill, city or borough, or may take customs or tolls, and they are exempted through all the realm by land or by sea from paying tolls or any other custom, if he has afterwards granted a like liberty to certain persons within his realm, that they may take and be exempt according as aforesaid, we must see which of them ought to be preferred in such liberty, since it has been granted to some that they may take tolls and customs and not render them to others, which cannot well stand together. We must recur therefore of necessity to the priority of the grant, if none of them have used it or as it were used it. But if one of them has used it, so that he has taken from the others tolls and customs in a vill or in a market or in a fair, and that he has enjoyed exemption in a vill or in a market or in a fair, such a person ought to be preferred on account of his use [of the grant], and ought to retain it, since he is prior in use, although not

f. 57. prior sit usu, quamvis non impetratione, & hoc verum erit, ubi posteriores impetratione usi fuerint, nisi illi qui priores sunt impetratione, statim & recenter sibi ꝑquisiverint. Si autem illi, qui priores sunt impetratione, priùs usi fuerint, & quòd ceperint ab aliis cō-suetudines in villa aliorum, libertates suas retinebunt, tam ꝑpt̄ prioritatem impetrationis, quàm prioritatem usus. Si autē post talem impetrationem libertatis & usum alii impetraverint libertatem, quòd uti possunt, alii qui priores sunt, ꝑpt̄ hoc libertatem suā non amittunt. Sed esto, quòd illi, qui priores sunt impetratione & usu, fortè ꝑ non usum vel abusum amiserint, & antequā restituti fuerint ad libertatem, alii impetraverint & usi fuerint, alii, qui priores fuerint impetratione & usu, nunquā restituentur. Si autem priores post impetrationem aliorum, sed ante usum restituti fuerint, sic per restitutionem libertatem priùs habitam retinebunt, & aliis præferentur ꝑpt̄ verū usum, qui usui fictitio debet præferri. Si quis igitur cōtra hujusmodi libertates, illos, quibus concessæ fuerint, gravare vel vexare præsumpserint, summoneatur, quòd sit corā rege vel ejus justic. inde responsur℈ per tale breve:

4. Breve, si quis alium vexaverit contra libertatem.

Rex vic. salutem. Summoneas ꝑ bonos summonitores majorē & ballivos talis civitatis, burgi, vel villæ, quòd sint coram nobis &c. vel corā justic. nostris apud talem locum, tali die, ad respondendū tali, vel talibus, quare ceperunt theoloniū & consuetudines in villa sua tali, de hominib℈ ipsi℈ talis, vel de talibus burgensibus, cōtra libertates, quas idem talis vel tales habent, ꝑ chartā nostrā, vel antecessorum nostrorum regum An-

in obtaining the grant, and this will be true, where those who are the later in obtaining the grant have used it, unless those who have been the first to obtain have forthwith and recently claimed it. But if those who were the first in obtaining the grant, have been the first to use [their liberties], and have taken customs from others in the vill of others, they shall retain their liberties as well on account of their priority in obtaining the grant, as of their priority in using it. But if after such a grant of a liberty and [such an] use of it, others have obtained the grant of a liberty, that they may use it, the others who were first, do not on that account lose their liberty. But let it be, that those who were first in obtaining the grant and in using it, perchance through non-user or abuse of it have lost it, and before they have been restored to the liberty, others have obtained a grant of it and have used it, the others, who were the first to obtain the grant and to use it, shall never be restored. But if the first, after others have obtained a grant and before they have used it, have been restored, they shall retain through this re-establishment the liberty formerly possessed by them, and shall be preferred to the others, on account of the true use, which ought to be preferred to the fictitious use. If any one therefore, contrary to these liberties, shall presume to burden or to harass those, to whom they have been granted, let him be summoned before the king or his justiciaries to answer thereon by a writ of this kind: f. 57.

4 A writ, if any one shall have harassed another contrary to a liberty.

The king sends greeting to the sheriff. Summon by trusty summoners the mayor and the bailiffs of such a city, borough, or vill, that they appear before us, &c., or before our justiciaries at such a place, on such a day, to answer to so and so, wherefore they have taken tolls and customs in his vill of his own people or of the burghers there, contrary to the liberties, which so and so has by our charter or by the charter of our ancestors, kings of

gliæ, quib⁹ hucusq; usi sunt, ut dicunt, & habeas ibi summonitores & hoc breve. Teste &c.

5. De intentione querentis proponenda.

Qui cùm post essonium & dilationes venerint, ꝑponat querens querelā suam, & intentionē hoc modo. Diçat, q cùm ipse & antecessores sui, & homines sui de tali villa, vel ipsi tales burgenses, à tali tempore quieti extiterint, & ipsi quieti esse debeant de theoloniis et aliis cōsuetudinibus dandis, tam in terra quàm in aqua, ubique in regno Angliæ, ꝑ chartas domini regis & antecessorū suorum regum Angliæ, si sint mercatores merchandisas suas exercentes, exceptis talibus merchādisis & talibus, ipsi ballivi distringunt ipsum, & homines suos, vel burgenses tales, ad dandum theolonium & alias consuetudines contra prædictas libertates, ita quòd ceperunt de tali, qui talem rem vendidit, tantum nomine theolonii, & de tali tantum. Et præterea ceperunt talem & imprisonaverunt, vel verberaverunt & male tractaverunt, & unde per talem injustam captionem damnum habent [1] ad valentiam tanti, & quòd tales habeat [2] libertates, & quòd talem acquietantiā habere debeat ꝑ chartā domini regis & antecessorū suorum regum Angliæ, profert chartam talem [3] regis, factam tali anno, tali mense, tali die regni sui, quæ testatur, quòd inter alias libertates, quas cōcedit tali, vel antecessoribus suis, cōcedit & confirmat ei, quòd ipse & hæredes sui, & homines eorum de tali villa, quieti sint & liberi de omni theolonio, & omnib⁹ cōsuetudinibus secularibus, quæ ad ipsum ꝑtinent in omni foro, & in omnib⁹ nundinis, per totum regnum suum, tam ꝑ terram quàm ꝑ mare, ubicunq; pervenerint, et per omnes terras suas, ubicunq; libertates dare ei poterit, profert etiam chartam talem alterius regis, tali anno

f. 57 b.

[1] "habet," MS. Rawl.
[2] "sunt," Rawl.
[3] "talis," Rawl.

England, which they have enjoyed, as they say, up to this time, and have there the summoners and this writ. Witness, &c.

5. Of propounding the issue of the complainant.

Who when they have come after the essoins and the delays, let the complainant propound his complaint and his issue in this manner. Let him say, that, when he himself and his ancestors, and his men of such a vill, and such and such burgesses, have been exempt from such a time, and ought themselves to be exempt from paying tolls and other customs, as well by land as by water, everywhere within the realm of England, by charters of the lord the king and his ancestors, kings of England, if they are merchants exercising their merchandise, excepting such and such merchandise, [notwithstanding] the bailiffs themselves distrain him and his men, or such and such burgesses, to pay tolls and other customs contrary to the aforesaid liberties, so that they have taken of such an one, who sold such a thing, so much, in the name of tolls, and of such an one so much. And besides they have taken and imprisoned so and so, or have beat him, or maltreated him, and hence through such unjust seizure he has been damaged to the value of so much, and that he has such liberties, and that he ought to have such an acquittance by a charter of the lord the king and his ancestors, kings of England, and he produces such a charter of the king made in such a year, in such a month, in such a day of his reign, which witnesseth that, amongst other liberties which he grants to such an one or to his ancestors, he concedes and grants to such an one, that he himself and his heirs, and their men of such a vill, shall be exempt and free of all tolls and all secular customs, which pertain to the king in every market and in every fair throughout all his realm, as well by land as by sea, wherever they may come, and throughout all his lands, wherever he can grant liberties to him, he also produces such a charter of another king, made in such a year of his reign, in such f. 57 b.

regni sui, tali mense, tali die confectam, quæ primam chartam confirmat, et per eadem verba, et sic proferre potest plures chartas regum antecessorum Angliæ. Profert etiam chartam talis regis, qui nunc est, tali anno, tali mense, tali die confectam ; per quam omnes chartas præcedentes confirmat, & per eadem verba, & per quam etiam concedit, quòd si prædict^{9} talis vel tales, vel eorum antecessores, prædictis libertatib^{9} usi non fuerint per tempus aliquod, per quod illas amiserint per non usum, quòd nihilominùs ipsi et hæredes sui illis de cætero utantur liberè & sine impedimento.

6. Quod in omni libertate concessa prioritas præferenda erit.

Et talis major & tales ballivi veniunt, & defendunt vim & injuriam, et injustam captionem theolonii, & consuetudinem, & dicunt, quòd antequam aliqua libertas concessa esset talibus burgensibus, qui queruntur, vel eorum antecessoribus ab aliquo rege concessa esset, vel antequam ipsi, qui queruntur, haberent villam, vel burgum, vel mercatum, vel feriam, vel etiam portum, habuerunt ipsi burgenses, de quibus queritur, villam suam, burgum, civitatem vel portum ad feodi firmam, de antecessoribus domini regis, sibi & hæredibus suis, cum omnibus libertatibus et liberis consuetudinibus, ad villam suam pertinentibus, de donatione talis regis, tenendum de eo et hæredibus suis, reddendo inde tantum per annum, & qui illam concessit ita liberè per chartam suam, sicut ipse illam unquam liberiùs habuit in manu sua die, quo concessionem illam eis fecit, & inde pferant chartas antiquiores, si quas habuerint, et regum succedentium cõfirmationes. Et unde dicere potuerunt, quòd sicut charta eorum aunciata est & libertas anterior, non potuit aliquis rex talem libertatem aliis concedere, in eorum præjudicium et injuriam, & inde petere judicium. Ad quod poterit à querentibus replicari, quòd si illi, de quibus queritur, chartam habuerint aunciatam, nunquã tamen usi fuerunt ipsi,

a month, on such a day, which confirms the first charter and in the same words, and so he can produce several charters of his ancestors, kings of England. He produces also a charter of such a king who is now [reigning], made in such a year, in such a month, on such a day, by which he confirms all preceding charters and in the same words, and by which he also grants, that if the aforesaid so and so or their ancestors have not used for some time such liberties, whereby they might have lost them from non-user, that nevertheless themselves and their heirs may for the future use them freely and without impediment.

6. That priority is to be preferred in any grant of a liberty.

And such mayor and such bailiffs come and defend the violence and injury and unjust taking of toll and the custom, and say, that before any liberty was granted to such burgesses as are complaining, or was granted by any king to their ancestors, or before the very persons, who are the complainants, had a vill or a borough or a market or a fair or even a port, the burgesses themselves, about whom complaint is made, had their vill or borough or city or port in fee-farm from the ancestors of the lord the king for themselves and their heirs with all liberties and free customs pertaining to their vill, by the gift of such a king, to hold of him and his heirs, by rendering therefrom so much by the year, and who granted it by his charter as freely as he had ever had it more freely in his hand on the day, on which he made the grant to them, and thereupon they produce more ancient charters, if they have any, and the confirmations of succeeding kings. And thereupon they may say that as their charter is more ancient, and their liberty prior in date, no king could grant such a liberty to others, to their prejudice and injury, and thereupon they may claim judgment. To which it may be replied by the complainants, that if those, respecting whom complaint is made, have a more ancient charter, they have neither themselves nor their ancestors ever used

vel antecessores eorum tali libertate, antequā eis, qui queruntur, et antecessorib⁹ eorum talis cōcessa esset libertas, q capere possent theolonium in villa tali, et quieti essent p totā terrā regis de theolonio et consuetudinib⁹ dandis, quia nullus burgensis de villa sua unquā priùs venit ad villam prædictorum, de quibus queritur, qui aliquid emeret vel venderet vel aliud faceret, p q teneretur dare theoloniū, vel alias cōsuetudines. Ad quod poterit ab illis, de quib⁹ queritur, replicari, q si null⁹ prædictorum burgensiū, de quib⁹ queritur, veniret in villā suā, ut aliquid emeret vel venderet, tamen libertatē suam non amiserunt p non usum, quia quam citò venerunt & emerunt, sive post, sive ante libertatem eis cōcessam, ceperunt theolonia & cōsuetudines, quia priùs uti non potuerunt. Item q ante libertatē eis cōcessam usi fuerint, ratione prioritatis, ita quòd ceperunt theoloniū, et cōsuetudines de tali, qui emit talem rem vel vendidit, et tantū dedit p cōsuetudine sua, et ali⁹ talis talē rem, & tantū dedit, et sic de plurib⁹, et petunt q p patriā inquiratur. Dicere etiā poterunt, q quāvis ita usi non essent, ut prædictū est, tamē cum charta eorum aunciata sit, et libertas anterior, nō sunt deusitati, quia nunquā antè evenit casus q uti possent, sive hoc fuerit ante libertatem posteri⁹ concessam, sive post. Item dicere possunt, quòd si fortè libertates suas amisissent p nō
f. 58. usum, tamen restituti sunt p dñm regem per verba in charta sua de confirmatione contenta, quæ talia sunt, quòd si fortè libertatibus illis priùs eis concessis usi non fuerint omninò, vel cùm usi fuerint, illas amiserunt p non usum, quòd nihilominùs illis utātur de cætero. Ad q verò, à parte adversa poterit replicari, quòd, quāvis tales ita restituti fuerint ad libertatem

such a liberty, before such liberty was granted to the complainants or to their ancestors, that they might take toll in such a vill, and be exempt through the whole land of the king's from paying toll or custom, because no burgess of their vill ever came before to the vill of the aforesaid, respecting whom complaint is made, to buy or to sell anything or to do anything for which he might be bound to pay toll or other customs. To which it may be rejoined by those about whom complaint is made, that if none of those burgesses, respecting whom complaint is made, has come to their vill to buy or to sell anything, they have not lost their liberty through non-user, because as soon as they came and bought [anything] either after or before the grant to them of the liberty, they took tolls and customs, because they could not use them before. Likewise because before the grant of the liberty to them they had used [their liberty] by reason of priority, inasmuch as they had taken toll and customs from such an one, who bought or sold such a thing, and paid so much for his custom-dues, and such another [had bought or sold] such a thing and paid so much, and so of several others, and they claim to go to the country. They may also say, that although they have not used it, as aforesaid, nevertheless since their charter is more ancient and their liberty prior in date, they are not divested by disuse, since there never before was an occasion, on which they could use it, whether this was before or after the grant of the later liberty. Likewise they may say, that if by chance they have lost their liberties by non-user, nevertheless they have been restored by the lord the king by the words contained in his charter of confirmation, which are such, that if by chance they have either not used at all the liberties previously granted to them, and when they have used them, they have lost them from non-user, that nevertheless they may use them in future. To which indeed, it may be sur-rejoined by the opposite side, that although such persous have been restored to f. 58.

quam priùs amiserunt p̄ non usum, tamen medio tempore ante restitutionē, cōcessit eis dñs rex per chartā suam libertatem, quam nunc habent, & unde cùm talis libertas ita eis concessa fuerit, non potuit dñs rex eis restituere libertatem, quam priùs aliis cōcessit, vel dicere poterit, quòd quāvis charta eorum postnata sit, & libertas posterior, tamen usu priores extiterint, et quamvis fortè libertatem suam talem, qua usi fuerunt, et usu priores, per non usum amitterent, licet utriq; restituti essent, tamē ipsi, sive priores sive posteriores impetratione vel usu, primā habuerunt restitutionem, et sic, ut videtur, in omni libertate cōcessa, in impetratione, usu, vel restitutione, erit prioritas præferenda.

Cap. XXV.

1. De confirmationibus.

Quia aliquando donationes, cùm perfectæ sint, ab hæredibus impediuntur, eget aliquando donatorius cōfirmatione hæredum, et aliquando dominorum capitalium, sicut domini regis, & aliorum inferiorum. Item, si cùm à vero domino facta fuerit donatio, & acquisitum dominium cum homagio & servitio et solennitate debita, & sit ibi defectus in donatione, q̄ in vita donatoris non sit sequuta traditio, & ita quòd imperfecta sit donatio, si donatorius quocunq; casu post mortem donatoris nactus fuerit seysinam, non valet donatio, cùm sit invalida, licèt aliqua, nisi confirmatio hæredis intervenerit, quæ si intervenerit, donatio convalescit. Item si quis rem alienā dederit, licèt ab initio valeat

their liberty, which they had lost previously through non-user, nevertheless in the intermediate time before the restitution [of it], the lord the king granted to them by his charter the liberty, which they now have, and hence since such a liberty has been so granted to them, the lord the king could not restore to them the liberty, which he has granted to others, or they may say, that although their charter is after-born, and their liberty later in date, nevertheless they are the earliest in using it, and although perchance they may have lost through non-user such their liberty which they have used, and were first to use, although it be restored to each, nevertheless themselves whether prior or posterior in obtaining the grant or in the use of it, had the earlier re-establishment of it, and so as it appears, in every grant of a liberty, in the obtaining of the grant, in the use of it and the re-establishment of it, priority is to be preferred.

Chapter XXV.

1. Of confirmations.

Because sometimes donations, when they are complete, are impeded by the heirs, the donatory has sometimes need of the confirmation of the heirs, and sometimes of the confirmation of chief lords, such as the lord the king and other inferior [lords]. Likewise when the donation has been made by the true lord, and the dominion acquired with homage and service and due solemnity, and there be in this respect a defect in the donation, that delivery has not followed in the lifetime of the donatory, and so far the donation be incomplete, if the donatory in whatever case has after the death of the donor obtained seysine, the donation does not avail, since it is ineffective, although it be of some value, unless the confirmation of the heir has intervened, which if it shall intervene, the donation becomes effective. Likewise if a person has given the thing of another, although from the commencement the donation avails, as far as regards

donatio, quantum ad donatorem & donatorium, non valebit tamen, quantum ad verum dominum. Ut si quis, quocunq; modo, tenuerit ad terminū vitæ, vel annorum, vel ratione custodiæ, vel pignoris, sive vadii, aliquam rem, & illam alicui dederit, licèt valida sit donatio, quantum ad dantem et accipientem, invalida tamen erit & in pendenti, quousq; à vero domino fuerit donatio talium revocata, vel talium confirmata.

1. Quid sit confirmatio.

Videndum igitur quid sit confirmatio, et est confirmatio prioris juris & dñii adepti firmatio, cum prima firmitate donationis, nihil enim novi attribuit, sed jus vetus consolidat, & confirmat. Si autē à capitali domino, vel ab alio non domino facta fuerit ei à latere, et unde, si ab initio donatio facta à vero dño valida fuerit, cōfirmatio facta ab aliis statim valida erit, et ita verū erit, q dicitur, quòd, ubi donatio valida, & confirmatio valida erit. Item si facta fuerit donatio à non dño, sicut ab illo qui tenet ad terminū, vel alio modo, sicut prædictū est, valebit cōfirmatio à latere facta, donec fuerit donatio à vero dño revocata, & cùm revocata fuerit, incipit non valere, quantum ad dantem & accipientem, et quantum ad verum dñm, cùm autē confirmata fuerit à vero dño, tunc valet & tenet sicut in initio donationis, et tunc primò incipit valere in persona veri domini. Si autem donatio omnino nulla, quia à lege omnino ꝑhibita, sicut donatio inter virum
f. 58 b. & uxorem, vel donatio facta ab eo, qui nullam omnino seysinam habuit, q tradere posset & rem accipientis facere, confirmatio à latere facta non valebit, & ibi est quod dicitur, q, ubi donatio nulla omnino, nec valebit

the donor and the donatory, it will not however avail as regards the true lord. As [for instance], if a person holds in whatever manner a certain thing for the term of his life, or for a term of years, or by reason of its being in his keeping or being a pledge or a security, and gives it to some person, although the gift be valid as regards the giver and the receiver, it will be invalid and in suspense, until the donation of such thing has been either revoked or confirmed by the true lord.

2. What is confirmation.

Let us see then what is confirmation, and confirmation is the affirmation of previous right and of lordship acquired together with the first firmation of the donation, for it attributes nothing new, but it consolidates and confirms the old right. But if the confirmation has been made by the chief lord, or collaterally by another not the lord, and hence if from the commencement the donation made by the true lord has been valid, the confirmation made by others will be immediately valid, and so it will be true what is said, that where the donation is valid, the confirmation will be valid. Likewise if a donation has been made by one, who is not the lord, as by him, who holds for a term or in some other manner, as above mentioned, the confirmation made collaterally will avail, until the donation has been revoked by the true lord, and when it shall have been revoked, it begins to be invalid, as far as the giver and the receiver are concerned, and as far as regards the true lord, but when it has been confimed by the true lord, then it avails and holds as at the commencement of a gift, and then it begins to be valid in the person of the true lord. f. 58 b. But if the donation be altogether null, because it is altogether prohibited by law, as a gift between a husband and wife, or a donation made by him, who has had no seysine [of the thing] at all, which he could deliver and make the thing the acceptor's, confirmation made collaterally will not avail, and this is the case, where it is said, that where there is no donation, there is no con-

confirmatio. Sed generaliter, cùm quis in possessione fuerit ex quacunq; causa vera vel fictitia, & verus dñs sciens et præsens hoc voluerit, & donationem vel venditionem à quocūq; factam confirmaverit, confirmatio validum facit, quod actum fuit, ex quo dñs hoc voluit, voluntas enim sua & confirmatio omnes supplet defectus, licèt id, q actum est, ab initio non valuit. Et hoc dico, nisi error fuerit ab initio in donatione, quia si error fuerit ab initio in donatione, non plus valebit confirmatio, quàm valet donatio. Poterit enim esse error tam rei quàm psonæ in donatione, & eodem modo in confirmatione, & sive erratum fuerit in persona sive in re, non valebit, q agitur, quia, qui errat, non consentit; ut si quis donationem fecerit alicui, sicut hæredi, talis cùm non sit hæres, & postea sequatur confirmatio, non valebit confirmatio, non magis quàm donatio. Item si cùm capitalis dñs aliquem posuerit in seysinā alicujus hæreditatis, & credat ipsum esse hæredem, cùm non sit, sicut part^{o} suppositus, vel alius à vero hærede, & homagium suum ceperit, & confirmationes intervenerint, non valebit, q agitur, ꝑpter errorem psonarum, sed hoc detecto, dissolvendum erit homagium, quia ipse, qui homagium fecit, nihil juris habuit in tenem̃to, de quo homagiū fecit, nec de eo tenere debet tenem̃tum, de quo homagium fecit. Item eodem modo poterit esse error de ipsa re in donatione, ut si donator senserit de una re, & donatorius de alia, non valebit donatio, nec cōfirmatio, quæ sequitur ex tali donatione. Item non valebit confirmatio, si in donatione erratum non sit, & erratum sit in cōfirmatione.

firmation. But generally, when a person has been in possession from whatever cause, true or fictitious, and the true lord knowing and present has so willed, and has confirmed the gift or the sale by whomsoever made, the confirmation makes that, which has been done, valid, since the lord has so willed, for his will and confirmation supply all defects, although that which has been done was not from the commencement valid. And this I say, unless there has been an error from the commencement in the donation, because if there has been an error from the commencement in the donation, the confirmation will not be any more valid, than the donation was valid. For there may be an error as well of the thing as of the person in the donation, and in the same manner in the confirmation, and whether the error has been in the person or in the thing, what is done will not be valid, because he who is in error is not consenting, as [for instance] if a person makes a donation to a certain person, as his heir, when such person is not his heir, and a confirmation follows afterwards, the confirmation will not be any more valid than the donation. Likewise if, when the chief lord has put a certain person into seysine of a certain inheritance, and believes him to be the heir, when he is not, like a supposititious offspring, or another than the true heir, and has taken his homage, and confirmations have intervened, what is done will not be valid on account of the error respecting the persons, but when this has been detected, the homage will have to be dissolved, because he who has done the homage, had no right in the tenement, for which he has done homage. Likewise in the same manner there may be error concerning the thing itself in a donation, as if the donor meant one thing, and the donatory another, the donation will not be valid, nor the confirmation, which follows upon such a donation. Likewise a confirmation will not be valid, if there be no error in the donation, and there be an error in the confirmation.

3. Quando quis possit confirmare.

Item videndū, quando quis possit cōfirmare, et sciendū, quòd nō, priusquā jus ei acciderit, vz. hæreditas, vel dominium, q̄ possit infirmare donationem antecessoris p̄p̃ aliquem defectum, ut, si in vita donatoris nō fuerit traditio subsequuta, unde in vita donatoris non valebit confirmatio. Item, si cùm jus ei descenderit, totū jus suum ad alium transtulerit, sive res corporalis fuerit, sive incorporalis, sicut jus. Item nec valet cōfirmatio facta ei, qui fuerit extra seysinam rei, de qua fit cōfirmatio, sicut videri poterit p̄ exemplū. Quidam dedit quandā advocationem cujusdam ecclesiæ cuidam abbati (cum tenem̃to vel sine, non refert), & fecit ei chartā super donatione illa, obiit donator, antequam ecclesia vacaret, & hæres donatoris præsentavit ad ecclesiam illam qualitercunq̄, de facto, & clericus admissus fuit ad suam præsentationem, et ita, q̄ charta abbatis vacua fuit p̄ non usum, moritur hæres sic in possessione, et transfert possessionem suā ad hæredem suum, iste hæres, ex quacunq̄ causa, transfert ad alium manerium, ad q̄ p̄tinet advocatio, cum omnibus p̄tiñ suis, sine aliqua retentione, tenendum in feodo. Abbas, cum charta sua vacua impetrat ab hærede, qui transtulit, & qui est extra possessionē advocationis, confirmationem donationis factæ ab antecessore suo, primo donatore, ut validam faciat primā donationem (per cō-
f. 59. firmationem), quæ effecta fuit invalida & vacua per non usum, confirmat ei, & super hoc faciunt inter se finem per chirographum.[1] Posteà vacat ecclesia, præsentat abbas, præsentat donatorius secundus. Dicit abbas, q̄ ad ipsum pertinet advocatio & præsentatio, & ad hoc p̄bandum profert quandam chartam talis antecessoris de donatione & confirmatione hæredis, & finem factum.

[1] "chyrograffum," MS. Rawl.

3. When a person may confirm, and when the confirmation, is valid, and when not.

Likewise we must see, when a person may confirm, and it is to be known that [he cannot confirm] before a right has devolved to him, as for instance, an inheritance or a lordship, so that he may invalidate the gift of an ancestor on account of some defect, as if in the lifetime of the donor delivery has not followed, thence in the lifetime of the donor confirmation will not be valid. Likewise, if when the right has descended to him, he has transferred all his right to another, whether it be a corporeal thing, or incorporeal, as a right. Likewise a confirmation is not valid, which is made to him, who is without the seysine of the thing, which is the subject of the confirmation, as may be seen by an example.

A certain person gave a certain advowson of a certain church to a certain abbot (with or without a tenement is immaterial), and executed for him a charter respecting the donation, the donor died before the church became vacant, and the heir of the donor presented to the church howsoever, as a fact, and the clerk was admitted to his presentation, and so that the charter of the abbot was void from non-user, the heir dies thus in possession and transfers his possession to his heir, that heir, from whatever cause, transfers to another the manor to which the advowson belongs, with all appurtenances, without any thing being retained, to be held in fee. The abbot with his void charter claims from the heir, who has transferred it and is out of possession of the advowson, the confirmation of the donation made by his ancestor, the first donor, that he may make the first donation valid by his confirmation, which [donation] was made f. 59. invalid and void by non-user; he confirms it to him, and they make a fine between themselves by a chirograph. Afterwards the church becomes vacant, the abbot presents, and the second donatory presents. The abbot says, that the advowson and the presentation belongs to him, and to prove this produces a certain charter of such an ancestor respecting the donation, and the

Donatorius verò dicit, quòd ad ipsum pertinet præsentatio, quia habet totum manerium illud cum omnibus suis pertinentiis, sine aliqua retentione de donatione prædicti hæredis, cujus antecessor præsentavit post confectionem illius chartæ, quam abbas profert, & ita, q̃ charta illa vacua est. Ad quod respondet abbas, quòd charta valida est & bona, & si ab initio vacua esset per non usum, tamen hæres donatoris facit eam validā p̃ confirmationem sequentem, quæ omnes defectus supplere potest, sine alicujus præjudicio, & quæ confirmatio per finem & chirographum, q̃ sic ostendit, roboratur. Ad quod dicit donatorius, quòd nec confirmatio, nec finis, qui sequitur ex ea, valere debeant, quia cùm hæres confirmavit, & antè dederat ipse manerium, ad quod pertinet advocatio, ipsi donatorio cum omnibus pertinentiis suis sine aliqua retentione, & quia facta fuit confirmatio post donationem & translationem juris sui ad alium, & sic, dum fuit extra seysinam, valere non debeat confirmatio, nec finis qui sequitur ex ea, & exinde nec charta, cùm sit vacua, nec confirmatio sine seysina, nec finis qui sequitur ex ea. Item esto, q̃ hæres, cùm sic sit in seysina, manerium cum pertinentiis dimiserit ad firmam, ad terminū annorū, & post dimissionē, durante termino, confirmaverit abbati donationē factam ab antecessore suo, eodem modo quo prædictū est, vacat ecclesia, præsentat abbas, præsentat hæres, p̃sentat firmarius. Abbati præsentanti respōdet hæres, quòd charta antecessoris sui vacua est p̃ nō usum. Ad q̃ abbas respōdet, q̃ licèt charta antecessoris sui vacua sit ab initio, tamen efficitur valida p̃ cō-firmationem, vel per finē. Ad q̃ hæres respondet, quòd

confirmation of the heir, and the fine made. The donatory, however, says, that the presentation belongs to him, because he has the whole of that manor with all its appurtenances, without any retention, by the gift of the aforesaid heir, whose ancestor presented after the making of that charter, which the abbot produces, and therefore that charter is void. To which the abbot answers, that the charter is valid and good, and if it has been from the commencement void from non-user, nevertheless the heir of the donor has made it valid by a subsequent confirmation, which may supply all defects, without prejudice to any one, and which confirmation is corroborated by the fine and by the signed deed, which he exhibits. To which the donatory says, that neither the confirmation, nor the fine which followed it, ought to be valid, because when the heir confirmed, he had already himself given the manor, to which the advowson appertained, to the donatory himself with all its appurtenances, without any reservation, and because the confirmation was made after the donation and the transfer of his right to another, and so when he was out of seysine, the confirmation ought not to be valid, nor the fine which followed it, and therefore neither the charter, since it is void, nor the confirmation without seysine, nor the fine which follows it. Likewise let it be, that the heir when he was thus in seysine, has let for a term of years the manor with its appurtenances, and after the lease, during the term, has confirmed to the abbot the donation made by his ancestor, in the same way as abovesaid, and the church becomes vacant, and the abbot presents, and the heir presents, and the lessee presents. The heir replies to the abbot who presents, that the charter of his ancestor is void from non-user. To which the abbot replies, that although the charter of his ancestor may be void from the commencement, nevertheless it is made valid by the confirmation and by the fine. To which the heir replies, that neither the charter,

nec charta, nec confirmatio, nec finis valere debeant, quia ante hæc omnia dederat ipse ad terminum maneriū cum advocatione. Ad q abbas respondet, quòd hoc ei nocere non debet, quia quāvis hæres manerium cum pertiñ daret ad terminū, tamen remansit ei ꝑprietas & liberum teñtum, & ꝑpt̃ q valida debet esse cōfirmatio. Ad q firmari⁹ respōdet, quòd ad ipsum ꝑtinet præsentatio, quia ante cōfirmationē dimissum ei fuit manerium sine retentione ad terminū, cum omnibus ꝑtinentiis suis, & quòd cōfirmatio subsequens nihil juris ei auferri potuit, & quo casu firmari⁹ obtinebit, & cùm ita præsentaverit, cōtinuat possessionē hæredis, cuj⁹ nomine præsentaverit, & sic cōfirmatio illa est vacua, nisi post terminum ratificata fuerit ab hærede. Sed retento primo casu, si infra terminū ecclesia non vacaverit, semper erit cōfirmatio facta post traditionem in pendenti, quousq, terminus præterierit, & cùm ecclesia infra terminum non vacaverit, extunc incipiet confirmatio firma esse & valida, & extunc pertinebit præsentatio ad abbatem. Et hæc omnia locum habebunt in omni casu, ubi tenementum ad quod advocatio pertinuerit, ad dominum proprietatis post tempus & terminum erit reversurum. Ut, si cui concedatur tenementum cum pertinentiis usq, ad ætatem alicujus, vel
f. 59 b. donec provisum fuerit, vel si quis tenuerit ad vitam quacunque ratione, quòd confirmatio omnino non valeat, vel remaneat in suspenso. Si autem fiat donatio & concessio alicujus rei corporalis vel juris ab aliquo, sine aliqua spe reversionis, & sequatur traditio, ex tunc, si fiat confirmatio alicujus donationis præcedentis, quæ

nor the confirmation, nor the fine ought to be valid, because before them all he had given the manor with the advowson for a term. To which the abbot responds that this ought not to damage him, because although the heir had given the manor with its appurtenances for a term, nevertheless the property and freehold remained to him, by reason of which the confirmation ought to be valid. To which the termor answers, that the presentation belongs to him, because before the confirmation the manor had been demised to him without any reservation for a term, with all its appurtenances, and that the subsequent confirmation could not take away from him any right, and in which case the termor will prevail, and when he has thus presented, he continues the possession of the heir, in whose name he has presented, and so the confirmation is void, unless it is ratified by the heir after the term. But as regards the first case, if the church has not become vacant during the term of the lease, the confirmation made after the delivery will always be in suspense, until the term be passed, and when the church has not become vacant within the term, thenceforward the confirmation will begin to be firm and valid, and thenceforth the presentation will belong to the abbot. And all these things will have a place in every case, where the tenement, to which the advowson has belonged, will be about to revert to the lord of the property, after a time and a term. As [for instance] if there be granted to any one a tenement with its appurtenances up to the age of a certain individual, or until it has been provided for, or if anybody has held it for his life in any manner, so f. 59 b. that the confirmation is altogether not valid or remains in suspense. But if a donation or grant of any corporeal thing, or of any right be made by any one, without any hope of reversion, and delivery follows, thenceforth if there be made a confirmation of any preceding donation, which was imperfect, or of which a

imperfecta fuerit, vel cujus seysinam quis amiserit per non usum, non valebit, licèt posteà res ex alia causa, sicut per eschaetam, revertatur ad donatorem, quia extunc alia confirmatione opus erit. Si autem dubium fuerit an revertatur, tamen non valebit confirmatio, si fortè fuerit p̄ præsentationem interrupta. In hoc passu[1] habetur, quòd non valet confirmatio, nisi ille qui confirmat sit in possessione rei vel juris, unde fieri debet confirmatio, & eodem modo, nisi ille, cui confirmatio fit, sit in possessione.[1] Et in omni casu, oportet quòd ille, qui confirmat vel recognoscit, sit in possessione rei vel juris, de quibus fieri debet confirmatio, vel recognitio, & eodem modo ille, cui fit, quia si nullus, non valebit, quod actum erit. Item fieri poterit confirmatio sic, quòd confirmatio dependeat ex prima donatione, ut si quis dicat, confirmo tali talem rem, vel donationem talem, sicut rationabiliter facta est, ex tali cōfirmatione non valebit prima donatio, nisi in se valida fuerit & perfecta, per hujusmodi enim verba coarctatur, & distringitur,[2] ita quòd nullū supplere poterit defectum, quod non est in simplici confirmatione, ubi non requiritur, utrum donum sit rationabile vel non, perfectum vel imperfectum, vel omnino nullum. Item sciendum, quòd confirmatio specialis debet referri ad' tempus illud, quo donatio conscripta sit, sicut ad alias ratihabitiones negotiorum. Est autem confirmatio quasi quædam ratihabitio, sufficit tamen quandoq̄ per se, si etiam in se contineat donationē, ut si dicat quis, dedi & confirmavi, licèt juvari possit ex aliqua donatione præcedente. Effectus autem confirmationis est, quòd ille qui alicujus donum confirmat, sive suum proprium, sive alienum, vel antecessoris vel

[1] "In hoc passu," down to "sit in possessione," inclusively, is omitted in MS. Rawl.

[2] "restringitur," MS. Rawl.

certain person has lost the seysine from disuser, it will not be valid, although the thing afterwards from another cause, as by escheat, has reverted to the donor, because thereupon there will be need of another confirmation. But if it be doubtful whether it has reverted, nevertheless the confirmation will not be valid, if it be by chance interrupted by the presentation. In this position it is held, that the confirmation is not valid, unless he who confirms is in possession of the thing or of the right, of which the confirmation is to be made, and in the same manner unless he, to whom the confirmation is made, should be in possession. And in every case it behoves that he, who confirms or recognises, should be in possession of the thing or of the right, respecting which the confirmation or recognition is to be made, and in the same manner he, to whom it is made, because if he be not so, what is done, will be not valid. Likewise a confirmation may be made in this manner, that the confirmation is dependent upon the first donation, as if a person should say, I confirm to such an one such a thing or such a donation, according as it has been reasonably made, from such a confirmation the first donation will not be valid, unless it was valid in itself and complete, for by words of this kind it is narrowed and restricted, so that it cannot supply any defect, which is not the case in a simple confirmation where it is not required, whether the gift be reasonable or not, complete or incomplete, or altogether null. Likewise it is to be known, that a special confirmation ought to be referred to that time, when the donation was reduced into writing, like as in reference to other ratifications of negotiations. But a confirmation is a kind of ratification; it is, however, sufficient sometimes of itself, if it contains in itself a donation, as if a person should say, I have given and confirmed, although he may be assisted from some preceding donation. But the effect of a confirmation is, that he, who confirms the gift of any one, whether his own or that of another person, or of an ancestor, or of

extraneæ personæ, proprium, ut si quis, dum fuerit[1] infra ætatem, vel dum nō fuerit sanæ mentis, vel non sui juris, vel per vim donationem fecerit, cùm plenæ ætatis extiterit, vel sanæ mentis, vel sui juris, vel extra violentiam constitutus, eam confirmaverit, illam nunquam infirmare poterit. Item si donum antecessoris vel alterius confirmaverit hæres, sive donum perfectum fuerit sive non, validum vel invalidum, illud infirmari non poterit. Quod autē dictum est de advocationibus, quæ sunt de pertinentiis in re ppria, observandum erit in servitutibus, quæ pertinent ad liberum tenemtum alicujus in re aliena, ut si cui concedatur & hæredibus suis jus pascendi, & eundi in fundo alieno, & hujusmodi, quamvis ipse non utatur in vita sua, hæredes tamen in donatione cōprehensi uti poterunt. Et eodem modo assignati & donatorii (si de illis in donatione mentio habeatur) propter modum donationis. Si autem nulla, donator usum transferre non potuit, quem non habuit. Sed si per negligentiam, & patientiam primi donatoris tales diu usi fuerint, vel si confirmatio ipsius vel hæredum suorum intervenerit, usus convalescit per virtutem confirmationis. Sed & diversæ sunt causæ[2] adquirendæ rerum dominia, ut causa testamentaria, causa emptionis & venditionis, & ex locato,
f. 60. & conducto. Sed quia succurritur agentibus, & jus suum prosequentibus in eisdem, per breve de debito, vel quasi, ideò inferiùs de debito pleniùs dicetur.[2]

Cap. XXVI.

1. De donationibus inter mor-

Est autem inter alias donationes donatio mortis causa, quæ morte confirmatur, cujus tres sunt species, una cùm quis nullo præsentis mortis periculi metu

[1] "dum fuerit," omitted MS. Rawl.

[2] "Sed et diversæ sunt causæ" down to "plenius dicetur" inclusive, omitted in MS. Rawl.

a strange person, his own, as if a person, whilst he was under age, or whilst he was not of sane mind, or not in his own power, or through constraint has made a donation, and has confirmed it when he has become of full age, or of sane mind, or in his own power, or has been released from constraint, he can never invalidate it. Likewise if the heir has confirmed the gift of an ancestor of another, whether the gift has been perfect or not, valid or invalid, it cannot be invalidated. But what has been said about advowsons, which are of the appurtenances to property, will have to be observed in the case of servitudes, which appertain to the freehold of any one in another person's property, as if the right of pasture and of way, and such like, in the estate of another be conceded to any one and to his heirs, although he may not use it during his life, his heirs nevertheless, being comprehended in the gift, may use it. And in the same way assigns and donatories (if mention is made of them in the donation) on account of the manner of the donation. But if there is no mention, the donor cannot transfer an use, which he never had. But if through the negligence and the sufferance of the first donor such persons have long used it, or if the confirmation of himself or of his heirs has intervened, the use becomes valid in virtue of the confirmation. But there are different causes of acquiring the dominion of things, as a testamentary cause, a cause of buying and selling, a cause of letting and hiring. But because aid is given f. 60. to suitors and to those who prosecute their right in the same by a writ of debt, or as it were [of debt], on that ground it will be discussed below on the subject of debt.

Chapter XXVI.

There is also amongst other donations a donation in 1. Of donation between the view of death, one when a person is not crushed by any fear of a present danger of death, but gives solely from

tuos et mortis causa. Glanville, vii. c. 5. Dig. XXXIX. t. 6, § 2.

conteritur, sed sola cogitatione mortalitatis donat; alia, cùm quis imminente periculo mortis commotus, ita donat, ut statim fiat accipientis. Tertia, ut si quis commotus periculo, non dat sic, ut statim fiat accipientis, sed tunc demùm, cùm mors fuerit insequuta. Et mortis causa donatio potest esse multiplex, ut si quis contemplatione, vel suspitione mortis, alicui dat, cujusmodi donationes sæpè fiunt ab ægrotantibus, vel ab eis, qui in aciem sunt ituri, vel per mare navigaturi, vel peregre pfecturi, & in se tacitam habeant conditionem, ut hujusmodi donationes revocentur, si ægrotus convaluerit, si miles ab acie redierit, si nauta à navigatione, & peregrinus à peregrinatione. Et donationes, quæ sic fiunt propter mortis suspitionem, morte testatoris confirmantur: & sic fiunt, ut si quid humanitùs contigerit de testatore, habeat is, cui legatum est, legatum, si autem convalescat, retineat, vel rehabeat legatum, vel si priùs moriatur ille, cui legatum est. Et si duo, qui sibi invicem mortis causa donaverint, pariter decesserint, neutrius hæres repetet, quia neuter alterum supervixit. Et est re vera talis donatio mortis causa, cùm testator rem legatam se ipsum magis habere voluerit, quàm eum, cui legata fuerit, & eum, cui legata est, magis quàm hæredem suum. Si autem sic donetur mortis causa, ut nullo casu revocetur: causa donandi magis est, quàm mortis causa donatio, & ideò perinde haberi debet, sicut alia quævis inter vivos donatio, & ideò inter viros & uxores non valet. Mortis causa donare licet, non tantùm infirmæ valitudinis causa, sed periculi, & propinquæ mortis, ab hoste vel à prædonibus, vel ob hominis potentis crudelitatem,

the contemplation of mortality; another when a person moved by the imminent danger of death, gives in such terms that the thing forthwith becomes [the property] of the acceptor. A third, as [for instance] if a person moved by danger does not give in such terms, that the thing forthwith becomes the acceptor's, but only then, when death has followed. And a donation in view of death may be manifold, as [for instance] if a person in contemplation or suspicion of death, gives to a certain person, which kind of donations are frequently made by sick persons, or by those who are going into battle, or are about to sail by sea, or are about to travel abroad, and have in themselves a tacit condition, that such kinds of donations may be revoked, if the sick man recovers, if the soldier returns safe from action, if the sailor returns from his voyage and the traveller from his journey. And donations, which are thus made from suspicion of death, are confirmed by the death of the testator, and they are made [on this understanding], that if any thing happens humanly to the testator, he, to whom the legacy is made, shall have the legacy, but if the testator recovers, he shall retain or regain the legacy, or if he to whom the legacy is given, dies first. And if two persons, who have made mutual donations to each other in view of death, die at the same time, the heir of neither shall claim, because neither has survived the other. And such a donation is in reality [a donation] in view of death, when a testator wishes himself to possess the legacy, rather than the legatee, and the legatee [to possess it] rather than his heir. But if it were so given in view of death, that it could not in any case be revoked, the object in giving is more than a giving in view of death, and ought to be accounted of the same effect as any other donation between the living, and therefore as between husband and wife it is not valid. It is allowable to make a donation in view of death, not only on account of infirm health, but on account of danger, and approaching death from an enemy or from robbers, or

dead and in view of death.

vel odium, aut causa navigationis, vel peregrinationis imminentis, aut si quis fuerit per insidiosa loca iturus, hæc enim omnia instans periculum demonstrant. Tenentur autem hæredes parentum suorum & aliorum antecessorum, quorum hæredes extiterint, testamenta servare, & eorum debita, ad quæ catalla sua non sufficiunt, acquietare. Inprimis autem debet quilibet, qui testamentum fecerit, dominum suum de meliori re, quam habuerit, recognoscere, & posteà, ecclesiam de alia meliori. Et quibusdam locis habet ecclesia melius averium de consuetudine, vel secundum, vel tertium melius, in quibusdam nihil; & ideò consideranda est consuetudo loci. Item de morte uxoris alicujus (dum vir superstes fuerit), de toto grege cōmuni secundùm melius averium, quasi de parte sua, sed hoc non nisi de ꝑmissione & gratia viri sui. Et quamvis non teneretur quis aliquid dare ecclesiæ suæ nomine sepulturæ, f. 60 b. tamen cùm consuetudo illa laudabilis existat, Dominus Papa non vult eam infringere, postquā verò quis ecclesiam suam ita recognoverit, deinde parentes & alias ꝑsonas, secundùm q̄ ei placuerit, respiciat. Mulier verò, quæ sui juris extiterit, testam̃tum facere potest, sicut alia quævis persona, & disponere de rebus suis, & fructibus in dote sua existentibus, sive separati sint à solo sive non, q̄ quidem olim facere nō potuit, sed nunc potest, sed de gratia. Si autem fuerit sub potestate viri sui cōstituta, testam̃ti factionem nen habebit absq̄ viri sui voluntate, ꝑpter honestatē tamen receptum est quandoq̄, quòd testam̃tum facere possit de rationabili parte, quam habitura esset, si virum supervixisset, & maximè de rebus sibi datis & concessis ad ornamentū, quæ sua ꝑpria dici poterunt, sicut de robis & jocalibus.

Decret. Pars, ii. Caus. xiii. Qu. ii. § xii.

on account of the cruelty or hatred of a powerful man, or on account of an imminent voyage by sea or journey by land, or if a person is likely to pass through a place beset with snares, for all these things show urgent danger. For heirs are bound to observe the testaments of their parents and of their other ancestors, whose heirs they may be, and to acquit their debts, to which their chattels do not suffice. But every person, who shall make a testament, is bound in the first place to remember his lord with the best thing which he has, and afterwards the church with the next best thing. And in some places the church has the best beast, or the second, or the third best, and in some places nothing; and therefore the custom of the place is to be considered. Likewise upon the death of a wife, whilst her husband is surviving, of the whole common herd the second best beast, as for her share, but this not without the permission and favour of her husband. And although no one is bound to give anything to the church for burial, nevertheless where that laudable custom exists, the Lord the Pope does not wish to break through it, but after a person has thus remembered his church, let him pay regard to his parents and other persons according as he is pleased. But a woman, who is independent, may make a will, like any other person, and dispose of her property and the crops, which are part of her dowry, whether they have been separated from the soil or not, which she formerly could not do, but now she can, but as matter of favour. But if she be placed under the power of a husband, she will not have the right of making a will without the consent of her husband, nevertheless as a mark of respect for her, it is sometimes received that she may make a will of the reasonable part, which she is likely to have, if she should have survived her husband, and chiefly of the things given and granted to her for adornment, which may be properly called her own, as with regard to robes and jewels.

f. 60 b.

2. Ex quibus rebus poterit quis condere testamentum.

De quib⁹ rebus quis testam̃tum condere possit videndum erit, & sciendum q̃ de rebus suis mobilibus, vel de se moventib⁹, & quatenus superfuerit, deducto ære alieno, s. debitis aliorū, quia qui centum solidos habet, & centū solidos debet, &c. Item si pluribus debeatur, videndum quis debet præferri. Et sciendū, q̃ si testator dño regi teneatur, ipse rex erit omnibus aliis præferend⁹, & benè licebit vic. vel aliis ballivis dñi regis, si ostenderit literas dñi regis de summonitione scaccarii patentes, imbreviare & attachiare bona & catalla defuncti, inventa in laico feodo suo, ad valentiam ipsius debiti, q̃ debetur dño regi, per visum legalium hominum, & ita, q̃ nil inde amoveatur, donec debitum, quod clarum fuerit, persolvatur, & residuum catallorum executoribus relinquatur. Debitum verò defuncti, quod debetur Judeis, non usurabit, quamdiu hæres infra ætatem extiterit, et si debitū Judei in manum dñi regis devenerit, non capiat rex nisi sortem, s. catallum in charta cōtentum. Ad quæ etiam debita, vel alia acquietantia, uxor defuncti, si superstes fuerit, nil conferet de dote sua, cùm dos uxoris debeat esse libera. Item si liber homo intestatus & subito decesserit, dominus suus nil intromittat de bonis defuncti, nisi de hoc tantùm, quod ad ipsum pertinuerit, s. q̃ habeat suum herioth,[1] sed ad ecclesiam & ad amicos pertinebit executio bonorum, nullam enim meretur pœnam quis, quamvis decedat intestatus. Posteà verò, primò deduci debent debita aliorum, quæ clara sunt & recognita, inter quæ connumerari poterunt servitia servientium, & stipendia famulorum, dum tamen certa

Britton. l. iii. c. v. § 5.

[1] "herieth," MS. Rawl.

2. Of what things a person may make a will.

We must see of what things a person may make a will, and it is to be known, that a person may make a will of his moveable goods, and of his moveable stock, and of such surplus as may exist after deducting other people's money, that is, the debts due to others, because he who has a hundred shillings, and owes a hundred shillings, &c. And if there be debts owing to several, we must see who is to be preferred. And it is to be known, that, if the testator is bound to the lord the king, the king himself will have to be preferred to all others, and it will be perfectly allowable to the sheriff or other bailiffs of the king, if he has shown the letters patent of the king of a summons from the Exchequer, to imbreviate and to attach the goods and chattels of the deceased, found in his lay fee, to the value of the debt, which is due to the lord the king, by the sight of loyal men, and so that nothing be removed therefrom until the debt, which may be clear, is paid, and the residue of the chattels is left to the executors. But the debt of the deceased, which is due to the Jews, shall not pay interest, as long as the heir is below age. And if the debt of a Jew shall fall into the hand of the king, the king shall not take anything but the principal, that is, the chattel contained in the charter. To which debts also and other acquittances the wife of the deceased, if she survive, shall contribute nothing from her dower, since the dower of the wife ought to be free. Likewise if a free man has died intestate, and suddenly, his lord shall not meddle with the goods of the deceased, except as regards that alone, which appertains to himself, for instance, that he may have his heriot, but the executorship of the goods shall belong to the church and to his friends; for a man does not deserve any penalty, although he has died intestate. But afterwards in the first place the debts to others, which are clear and acknowledged, ought to be deducted, amongst which may be reckoned the services of the servants and the stipends of the

sunt. Si autem incerta sunt, sicut de servientibus, qui sine precio certo steterint in servitio alicuj⁹, licèt ex voluntate depēdeant, tamē cùm ex arbitrio testatorū & amicorū taxata fuerint, ex bonis defuncti deducantur. Item deduci debent expensæ faciēdæ circa fun⁹. Itē necessaria habeat uxor, usq; ad quarentenā, nisi ei fuerit sua dos citiùs assignata. His igitur omnib⁹, de bonis defūcti deductis, peculiū erit, q superfuerit. Si autē nihil superfuerit, vel fortè defunct⁹ tempore mortis nil in bonis habuit, p hoc remanebit hæres onerat⁹. Si autem post debita deducta, & post deductionē expensarū, quæ necessariæ erunt, ut prædictum est, id totum, q tunc superfuerit, dividatur in tres partes, quarū una pars relinquatur pueris, si pueros habuerit defunct⁹, secunda uxori, si superstes fuerit, & de tertia parte habeat testator liberam disponēdi facultatem. Si autem liberos nō habeat, tunc medietas
f. 61. defuncto, & alia medietas uxori reservetur. Si autē sine uxore decesserit, liberis existentib⁹, tūc medietas defuncto, & alia medietas liberis tribuatur. Si autē sine uxore & liberis, tunc id totū defuncto remanebit. Eodē modo, si ab initio nullis fuerit debitis oneratus, fiat de bonis suis, secundꝺ q p̃dict' est. Hæres autē defūcti tenebitur ad debita p̃decessoris sui acquietāda eaten⁹, quaten⁹ ad ipsum pvenerit, sci. de hæreditate defuncti, & nō ultrà, nisi velit de gratia, & si nihil, multò fortiùs. Sed si ad ipsum aliquid aliunde pervenerit, inhumanum esset, si debita parentum insoluta

assistants, provided they are certain [in amount]. But if they are uncertain, as in the case of servants, who have been in the service of any one without any certain pay, although they depend upon his pleasure, nevertheless, when they have been taxed at the discretion of testators and of the friends, they may be deducted from the goods of the deceased. Likewise the expenses of conducting his funeral ought to be deducted. Likewise his wife should have her necessaries, up to her quarentine, unless her dower has been sooner assigned to her. All these payments having been deducted, what remains will be the private estate of the deceased. But if nothing remains over, or by chance the deceased at the time of his death had no goods, thereupon the heir will remain burdened. But after the debts have been deducted and the necessary expenses have been deducted, as aforesaid, the whole, which remains over, shall be divided into three parts, of which let one part be left to the male children of the deceased, if he has male children, the second to the wife, if she survive, and of the third part the testator may have the free disposal. But if he have no children, then the one half shall be reserved to the deceased and the other half to the wife. f. 61. But if he has died without a wife, there being children, then the half shall be [at the disposal] of the deceased, and the half [shall go] to the children. But if he die without wife or children, then the whole shall be at the disposal of the deceased. In the same manner, if from the commencement he has been burdened with no debts, let it be done with his goods, as has been before said. But the heir of the deceased shall be bound to acquit the debts of his predecessor, as far as any thing has come to his hands from the inheritance of the deceased, and no further, unless he wishes to do so of favour, and if nothing has come into his hands, much more so. But if any thing has come to him from another source, it would be inhuman, if the debts of his parents remained

remanerent. Et ea, q̃ dicta sunt, locū habent & tenent, nisi sit consuetudo, q̃ se habeat in contrariū, sicut in civitatibus, burgis, & villis. Habet enim civitas Londoñ in consuetudine, q, si certa dos uxori constituatur, sive in denariis, sive in aliis catallis, sive domib⁹, q̃ loco catallorum habentur, nihil ulteriùs petere poterit, quam dotem suam de jure, nisi hoc fuerit de gratia & voluntate viri sui, si ei specialiter aliquid reliquerit ultra dotē, plus vel min⁹, & secund̄ q fuit benè merita in vita viri sui, vel non. Et est ratio, quare plus petere non possit quàm dotem constitutam, secundùm quosdā, quia ipsa ante oñs debitores dotem suam p̃deducet, totā vel partē, quamdiu tant̄ remanserit in bonis viri sui, & cùm totam dotem suā sic habere debeat p̃cipuā, sic vice-versa, si plura sint bona dotem excedentia, nihil ampliùs capiat quā dotem nominatā, nisi hoc fuerit de speciali gratia, ut p̃dictum est, & benè merito. Et illud idem observand̄ erit de liberis taliū, ut quidam dicunt, scilicet, quòd non ampliùs capient de bonis defuncti de jure (de bonis dico mobilibus), quàm fuerit eis specialiter relictum, nisi hoc sit de speciali gratia testatoris, secundùm quod dicitur de uxore, & si benè meriti fuerint in vita parentum. Et unde nihil possunt pueri petere magis, quàm uxores de jure, nisi tantum de gratia, vix enim inveniretur aliquis civis, qui in vita magnum quæstum faceret, si in morte sua cogeretur invitus bona sua relinquere pueris indoctis vel luxuriosis, & uxoribus malè meritis, & ideò necessariū est valdè, quòd illis in hac parte libera facultas tribuatur. Per hoc enim tollet maleficium, animabit ad virtutem, & tam uxoribus, quàm liberis benè faciendi dabit occasionem; quod quidem

unpaid. And the things above said hold good, unless there be a custom to the contrary, as in cities, boroughs, and vills. For the city of London has a custom, that if a certain dower be settled on a wife, whether in money or in chattels or in houses, which are counted as chattels, she cannot claim anything further than her dower of right, unless it be upon the favour and good will of her husband, if he has left her anything specially beyond her dower, more or less, and according as she has well deserved it in the lifetime of her husband, or not. And there is a reason, why she cannot claim more than her settled dower, according to some, because she can deduct her dower in priority before all the debtors, the whole or a part, as long as there remains so much in the goods of her husband, and since she ought to have all her dower in preference to the others, so vice versâ, if there are more goods exceeding the dower, she shall receive nothing except the dower specified, unless it be of special favour, as abovesaid, and upon good desert. And this same thing is to be observed of the children of such persons, as some say, namely, that they shall take no more of the goods of the deceased of right (I mean of moveable goods) than has been specially left to them, unless this be of the special favour of the testator, according to what has been said concerning the wife, and if they have well deserved it in the lifetime of their parents. And hence the male children cannot claim anything more than the wives of right, except of grace, for there would be scarcely found any citizen, who would make in his lifetime great acquisitions, if he were compellable at his death against his will to leave his goods to ignorant and lazy sons, or to wives who ill deserved them, and therefore it is very necessary that he should be allowed free liberty in this part. For through these means he will abolish misconduct, animate to virtue, and give to his wife and to his children an occasion for doing good; which would

non fieret, si se scirent indubitanter certam partem obtinere, etiam sine testatoris voluntate. Si autem plura sint debita, vel plus legatum fuit ignoranter vel scienter, ad quæ catalla defuncti non sufficient, excepto domini regis privilegio, fiat ubique defalcatio, excepto eo, quòd si debitum fuerit in eo quod defuerit, remaneat hæres obligatus. Fieri autem debet testamentum liberi hominis, ad minus coram duobus, vel pluribus viris legalibus & honestis, clericis vel laicis, ad hoc specialiter convocatis, ad probandum testamentum defuncti, si opus fuerit, si de testamento dubitetur. Executores autem esse debent illi, quos testator elegerit, sive sunt extranei sive parentes, propinqui vel remoti, & si de testamento oriatur contentio, in foro ecclesiastico debet placitum terminari, quia de causa testamentaria (sicut nec de causa matrimoniali) curia regia se non intromittit. Item quæro, an testator legare possit actiones suas? & verum est, quod non de debitis, q̃ in vita testatoris convicta non fuerunt nec recognita, sed hujusmodi actiones competunt hæredib⁹. Cū autem convicta sint & recognita, tunc sunt quasi in bonis testatoris, & competunt executoribus in foro ecclesiastico. Si autem cōpetant hæredibus, ut prædictum est, in foro seculari debent terminari, quia antequam communicantur & in foro debito, non pertinet ad executores, ut in foro ecclesiastico convincantur. Et in fine notandum est, quòd de bonis defuncti, primò deducenda sunt ea quæ sunt necessitatis, & posteà quæ sunt utilitatis, & ultimò quæ sunt voluntatis.

Britton, l. i. ch. xxix. § 35.
Fleta, 126.
f. 61 b.

not be done, if they knew without a doubt that they would obtain a certain portion, even without the consent of the testator. But if the debts be more numerous, or more has been bequeathed either ignorantly or knowingly, for which the chattels are not sufficient, let there be made a deduction everywhere, excepting the privilege of the lord the king, and with the exception, that if a debt be included in what is wanting, the heir shall remain bound by it. But the will of a free man ought to be made before two or more loyal and honest men at least, clergy or lay, specially called together for the purpose, to prove the will of the deceased, if it be necessary, if there should be a doubt respecting the will. But the executors ought to be those, whom the testator has chosen, whether they are strangers or relatives, near or remote; and if a contest arise respecting the will, the plaint ought to be determined in the ecclesiastical court, for the court of the king does not introduce itself into a testamentary cause, any more than into a matrimonial cause. Likewise I ask, can a testator bequeath his right of action? And it is true that he cannot, respecting the debts, which during the lifetime of the testator have not been proved nor acknowledged, but this kind of action may be brought by the heirs. But when they have been proved and recognised, they are then as it were amongst the goods of the testator, and his executors in the ecclesiastical court are entitled to them. But if the heirs are entitled to them as aforesaid, they must be determined in the secular court, for before they are reduced into common and in the due court, it does not appertain to the executors that they should be proved in the ecclesiastical court. And finally it is to be noted, that of the goods of the deceased, there are to be deducted first all those which are of necessity, afterwards those which are of utility, and lastly those which are of discretion.

f. 61 b.

Cap. XXVII.

1. De acquirendo rerum dominio, ex causa emptionis. Inst. III. t. 24.

Est autem quædā causa acquirendi reī dominia, q̃ dicitur causa emptionis & venditionis, cū quis rē suā vendiderit alicui, mobilē vel īmobilē, emptor tenetur venditori ad p̃cium & venditor emptori è converso ad ipsam rem tradendam, secund' q̱ superiùs observatur in donationibus, quia sine traditione non transferuntur reī dominia. Et quo casu, oportet q̱ certa sit res, quæ venditur, & q̱ certum constituatur p̃cium; nulla enim emptio esse potest sine certo p̃cio, nec etiam aliqua res incerta peti poterit. Certa itaq̱ esse possit ex certa quantitate, ut si dicat quis, vendam tibi unā carucatam terræ, vel virgatā terræ & hujusmodi. Item ex numero, ut si dicat quis, vendam tibi tot carucatas, tot virgatas, vel tot acras, vel hujusmodi. Item si dicat quis, vel quod tantundem valeat; ut si dicat totam terram, quam talis tenuit, vel de qua talis seysitus fuit die, quo obiit, vel totam terram, quæ cōtinetur inter tales divisas, & hujusmodi. Emptio vero & venditio cōtrahitur, cū de p̃cio convenerit inter contrahentes, dum tamen à venditore arrarum nomine aliquid receptum fuerit, quia, quod arrarum nomine datum est, argumentum est emptionis & venditionis contractæ. Et si scriptura intervenire debeat, non erit perfecta emptio & venditio, nisi cum fuerit partibus tradita & absoluta. Et cùm arræ non intervenerint, vel scriptura, nec traditio fuerit subsequuta, locus erit pœnitentiæ, & impunè recedere possunt partes contrahentes à contractu. Sed si precium solutum fuerit, vel ejꝰ pars, &

Chapter XXVII.

1. Of acquiring the dominion of things by reason of purchase.

But there is a reason of acquiring the dominion of things, which is called the reason of purchase and sale, when a person has sold a thing of his own to a certain person, a moveable or an immoveable, the purchaser is bound to the vendor for the price, and the vendor on the other hand to the purchaser for the delivery of the thing, according to what has been above observed in [treating of] donations, because the dominion of things is not transferred without delivery. And in which case it behoves, that there be a certain thing which is sold, and that a certain price be settled [for it], for there can be no purchase without a certain price, nor can any thing be claimed, which is uncertain. But a thing may be certain, which consists of a certain quantity, as if a person shall say, I will sell you one hide of land or one rod of land, or such like. Likewise, of a certain number, as if a person shall say, I will sell you so many hides, so many rods, so many acres, or such like. Likewise, if a person shall say, or which is worth so much, as if he shall say, the whole of the land which such a person had, or of which such a person was seised, on the day on which he died, or, so much land as is contained between such limits, and such like. But a purchase and sale is contracted, when the price has been agreed upon between the parties contracting, provided that something has been received by the vendor in the name of earnest, for what is received in the name of earnest is an argument of a contract for purchase and sale. And if a writing ought to intervene, the purchase and sale will not be perfect, except when it shall be delivered to the parties and completed. And when earnest money has not intervened, nor a writing, and delivery has not followed, there will be a place for repentance, and the contracting parties may with impunity recede from the contract. But if the price has been paid, or a part of it, and

traditio subsequuta, perfecta erit emptio & venditio, nec poterit posteà aliquis contrahentium à contractu resilire, prætextu precii non soluti in parte vel in toto. Sed agere poterit venditor, ad recuperandum id, quod de precio defuerit, per actionem competentem, sed non ad ipsam rehabendam. Nec etiam se ponere possit in seysinam rei venditæ, quin faciat disseysinam, nisi hoc faciat pactum incontinenti appositum in ipso contractu, & modus vel conditio, ut suprà dictum est pleniùs, de donationibus, & infrà dicetur de disseysina. Si autem inter contrahentes ita convenerit, quòd res empta sit tanti, quanti talis æstimaverit, nisi ille talis precium definierit, vel si ille definire noluerit, vel non possit, nulla erit emptio vel venditio, quasi nullo precio definito, vel constituto.

2. De arris datis.

Item cùm arrarum nomine aliquid datum fuerit ante traditionem, si emptorem emptionis pœnituerit, & à contractu resilire voluerit, perdat quod dedit; si autem

f. 62.

venditorem, q̃ arraꝝ nomine receperit, emptori restituat duplicatum. Cùm autem venditor rem ipsam vendiderit tanquā sanam, & sine mahemio, & posteà mahemiata inventa fuerit, vel minꝰ sana, & p̄bari possit ad emptore q̃ tempore contractus talis fuerit, tenebitur venditor rem suam rehabere. Sed si tempore cōtractus sana & sine mahemio fuerit, quicquid de ea posteà contigerit, non tenebitur. Item cùm rem īmobilem vendat quis, ut terrā, & in venditione p̄miserit eam esse liberā, cū sit serva, vel non oneratam, cùm sit onerata, vel non obligatam, cùm sit obligata, p̄pter hoc

delivery has followed, the purchase and sale will be complete, nor can any of the contracting parties recede from the contract, under the pretext of the price not having been paid in part or in whole. But the seller may bring an action to recover that which is wanting of the price, by a suitable action, but not to ratify the contract itself. Nor can he put himself into seysine of the thing sold, without making a disseysine, unless a covenant is added forthwith in the contract itself, and a mode or a condition, should so operate, as has been said above more fully concerning donations, and will be said below concerning disseysine. But if it has been so agreed upon between the contracting parties, that the thing shall be bought for such a price as such a one shall value it at, unless that person has defined the price, or if he has been unwilling to define it, or could not do it, there shall be no purchase or sale, as if no price had been fixed or settled.

2. Of earnest money, which has been given. f. 62.

Likewise when in the name of earnest money anything has been given before delivery, if the purchaser repents of his purchase, and wishes to recede from his contract, let him lose what he has given; but if the vendor repents, let him restore double of what he has received as earnest money. But when the vendor has sold a thing itself as sound and without blemish, and afterwards it be found to be blemished or unsound, and it can be proved by the purchaser that it was such at the time of the contract, the vendor shall be bound to take back his article. But if at the time of the contract it was sound and without blemish, whatever has happened to it subsequently, he shall not be bound by it. Likewise when a person has sold an immoveable thing, as land, and in the sale has undertaken that it is free, when it is subject to a service; or not burdened, when it is burdened; or not bound, when it is bound; the contract is not on that account rescinded, but the purchaser

non rescinditur contract², sed agere potest emptor cō-tra venditorē, ad hoc q ei teneat quod ꝑmisit. Cùm emptio & venditio contracta fuerit, ut p̃dictum est, ante traditionem & post, periculum rei emptæ & vendi-tæ illum generaliter respicit, qui eam tenet, nisi aliter ab initio convenerit, quia re vera qui rē emptori nonđ tradidit, adhuc ipse dñs erit, quia traditionibus & usucaptionibus, &c., ut suprà, de donationibus, secun-dùm quod videri poterit, ut si bos venditus mortuus fuerit ante traditionem, vel ædes incendio consumptæ, vel fundus vi fluminis in parte vel in toto consumptus, vel ablatus, & hujusmodi, quibus rationibus videtur q totum periculum ꝑtineat ad venditorē. A contrario verò videtur, quòd si post emptionem, ante traditio-nem, fundo vendito aliquid ꝑ alluvionem vel alio modo accreverit, quòd commodum ad venditorem pertinebit. Ipsum enim sequi debent commoda, quem sequuntur incommoda, & cōmođ ejus esse debebit, cujus est peri-culum. Item poterit emptio vel venditio cōtrahi inter aliquos, tam sub conditione quā purè: sub conditione ita, ut si talis res empta infra certum diē emptori placuerit, sit ei empta aureis tot, & si displicuerit emptori, restituatur. Si quis autem rem sacram, quæ vendi non potest, à venditore emerit, cùm contractus stare non poterit, emptor a venditore consequetur, qua-tenus suâ interfuit non fuisse deceptum, quamvis emp-tor scire teneatur, quæ & qualis sit res, quam emerit, sacra vel non sacra, obligata vel non obligata. Emptori verò & hæredibus suis tenetur venditor & hæredes sui

may bring an action against the vendor in order that he may make good what he has undertaken. When a purchase and sale have been contracted for, as aforesaid, before the delivery and after, the risk of the thing bought and sold regards him generally who holds it, unless it has been otherwise agreed upon from the beginning, because in truth, he who has not delivered a thing to the purchaser, is still himself the lord of it, because "by delivery and usucaption, &c.," as above in the chapter on donations; according to what may be seen, as if an ox, which has been sold, shall have died before delivery, or a house have been consumed by fire, or a field have been wasted or carried away in part or in whole by the force of a stream of water or such like, in which ways it seems that the whole danger pertains to the vendor. On the contrary however it appears, that if after the purchase and the sale any accretion has been made to a field, which has been sold, by alluvion or otherwise, the gain belongs to the purchaser. For the gain ought to attend him, whom the loss attends, and the advantages ought to belong to him who incurs the risks. Likewise a purchase and a sale may be contracted for between certain persons as well conditionally as absolutely; conditionally in this way, as for instance, if such a thing, which has been bought within a certain day, shall please the buyer, let it be bought for so many gold pieces, and if it shall displease the buyer, let it be returned. But if a person has purchased from a vendor a sacred thing, which cannot be sold, since the contract cannot stand, the purchaser shall obtain from the vendor damages for being deceived, although the purchaser may be bound to know, what and what sort of thing it be, which he has bought, sacred or not sacred, bound or not bound. But the seller and his heirs are bound to the purchaser and his heirs to warrant the thing to him, whether it be moveable or immoveable, provided that if

rem emptam warrantizare, sive mobilis, dum tamen si immobilis, fiat ut infra dicetur de warrantis, si autem mobilis, fiat ut infra dicetur de furtis.

Cap. XXVIII.

1. De locato et conducto.

Cum autē locatio & conductio ꝑxima sit emptioni, & venditioni, quia sicut emptio & venditio contrahitur postꝙ de p̃cio convenerit, ita locatio & conductio. Ex locato enī & conducto solet res deberi vel ad usum vel ad habitionē.[1] Ut si quis rē suā mobilē vel īmobilē alicui locaverit usꝙ ad certū tempus, pro certa mercede constituta, tenetur locator obligatus rē locatā ad usum dare, & conductor tenetur mercedē solvere, & si res īmobilis locata fuerit & conducta, sicut domus & hujusmodi, omnia invecta & illata tam pro mercede quam aliis pignori sunt annexa. Et quid si nihil in
f. 62 b. domibus locatis & conductis inveniatur? recurrend̄ erit ad corpora conductoꝝ, si inveniātur, quòd locatori ꝑspiciatur de securitate, si ab initio nō sit prospect'. Si autem corpora non inveniantur, hoc poterit locator suæ imputare negligentiæ vel imperitiæ, ꝙ sibi cautiùs non ꝑspexit. Si autem aliquis tenens fuerit, & redditum fortè dño suo non solverit, cùm ad vitam suam tenuerit, vel in feodo, ad districtionem faciendam aliter erit ꝓcedendum. Mortuo verò conductore infra tempus conductionis, hæres ejus eodem jure in conductionem succedit, nisi ille conductor in vita, vel in morte aliter duxerit ordinandum. Item elapso tempore conductio-

[1] habitacionem, MS. Rawl.

it be immoveable, it shall be done as shall be explained below [in the chapter] on warranties, and if moveable, it shall be done as shall be explained below in the chapter on thefts.

Chapter XXVIII.

1. Of letting and of hiring.

But letting and hiring are the next thing to buying and selling, because just as a purchase and a sale are contracted as soon as it is agreed about the price, so in like manner also a letting and hiring are contracted. For a thing is accustomed to be due either for use or for habitation upon an agreement to let or to hire. As if a person has let his moveable or immoveable property to a certain person during a certain time for a certain fixed payment, the lessor is held bound to give the thing so let for use, and the hirer is bound to make the payment, and if an immoveable thing shall have been let or hired, as a house or such like, all the things introduced or carried into it are annexed as well for the payment [agreed upon] as for a security to others. And what if nothing be found in houses let or hired? f. 62 b. We must have recourse then to the persons of the hirers, if they can be found, that provision be made for security to the lessor, if provision has not been made from the commencement. But if their persons cannot be found, the lessor must impute this to his own negligence or inexperience, that he has not provided for himself more cautiously. But if a certain person be in tenancy and shall not by chance pay to the lord his rent, when he holds it for life or in fee, proceedings must be otherwise taken to make distraint. But if the hirer be dead within the term of his hiring, his heir succeeds by the same right to the hiring, unless that hirer has thought it proper to regulate it otherwise for his lifetime or after his death. Likewise if the time of

nis in vita cõductoris, benè poterit locator se ponere in rem locatam authoritate propria, si eam vacuam invenerit & non obligatam.

2. De usu vestimentorum.

Qui pro usu vestimentorum, auri vel argenti, vel alterius ornamenti, vel jumenti mercedem dederit, vel ꝑmiserit, talis ab eo desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit, & rem aliquo casu amiserit, ad eam restituendam non tenebitur, nec sufficit, aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superiùs dictum est.

Cap. XXIX.

1. De acquirendo rerum dominio causa successionis, et qualiter hæredes succedunt parentibus.

Est etiã alia causa acquirendi reꝝ dñia, q̃ dicitur causa successionis, & quæ competit singulis hæredibꝫ de oĩbꝫ, de quibꝫ antecessores eoꝝ obierũt seysiti, ut de feodo, vel etiã seysiti aliquo tẽpore, ut de feodo & jure hæreditario, q̃ quidem descendere debet hæredibus ꝑpinquioribus, masculis vel fœminis, recta linea vel transversali venientibus. Descendit itaq̃ jus, quasi ponderosum quid cadens deorsum, recta linea vel transversali, & nunquam reascendit ea via, qua descendit, post mortem antecessorum. A latere tamen ascendit alicui, ꝑpter defectũ hæredum inferiùs provenientiũ. Et si seysina sive possessio aliquem exorbitet, ita quòd jus merum non sequatur, in fine tamen ad ꝑprietatem revertetur, si sit hæres qui petat. Item descendit jus vero hæredi, ubicunque natus fuesit, vel in utero matris, citra mare, vel ultra, nec potest aliquis sibi facere hæredem, quia solꝰ Deus hæredem facit. Et quia

the hiring has elapsed in the lifetime of the hirer, the lessor may well put himself into possession of the thing let by his own authority, if he has found it vacant and not bound.

2. Concerning the use of vestments.

He who has paid or promised remuneration for the use of vestments, of gold or of silver, or of any other ornament or of a beast of burden, such care of them is required from him, as a most diligent father of a family would apply to his own goods, which if he has exercised and he has lost a thing by some casualty, he shall not be bound to replace it; nor is it sufficient that he should have applied such diligence, as he would have applied to his own goods, unless he has applied such as we have described above.

Chapter XXIX.

1. Of acquiring the dominion of things by reason of succession, and in what ways heirs succeed to their relatives.

There is another cause of acquiring the dominion of things, which is called a cause of succession, and to which all heirs are entitled, as regards everything of which their ancestors have died seysed, as for instance of a fee, or also seysed at a certain time, as of a fee and by hereditary right, which ought to descend to next heirs, male or female, coming by the direct or a transverse line. This right, therefore, descends like something weighty falling downwards, by a direct or a transverse line, and it never reascends by the same way by which it has descended, after the death of ancestors. But it ascends laterally to some one on account of the defect of heirs lower down. And if seysine or possession excludes any one, so that the absolute right does not follow, nevertheless in the end it will return to the property, if it be the heir who claims. Likewise the right descends to the true heir, wherever he may have been born, or if he be still in the womb of his mother, within or beyond the sea, for God alone makes an heir, and because the

hæres dicitur ab hæreditate, & non hæreditas ab hærede, ideò primò videnđ est, quid sit hæreditas, posteà quis sit hæres legittimus, & quis ex plurib⁹ præferatur.

2. Quid sit hæreditas. Britton, l. vi. ch. i. § 1. Fleta, 370.

Et scienđ, quòd hæreditas est successio in universum jus, q defunctus antecessor habuit, ex quacunq; causa acquisitionis, vel successionis, cum seysina sive sine, ut si cum seysina, quocunque tempore seysitus fuerit, in vita sua, vel in morte, scilicet die quo obiit. Et si jus ad plures hæredes descendat successivè & sine seysina, tamen eadem seysina competit hæredi, quam antecessor habuit in vita vel in morte. Et cùm jus proprietatis concursum habuerit cum seysina, statim & sine mora acquiritur hæredi liberum tenementum.

f. 63.

3. Quis dici debeat hæres legittimus. Glanville, vii. 12.

Item videndum quis dici debeat hæres legittimus, quia, secundùm quod inferiùs dicitur, liberorum quidam sunt filii & hæredes, sicut sunt illi, qui ex justis nuptiis procreati sunt & progeniti, & ibi pleniùs. Legittimus vero hæres & filius est, quem nuptiæ demonstrant esse legittimum; sicut ille, qui natus est ex legittimo matrimonio, vel ille, qui in facie ecclesiæ legittimus reputatur, quamvis in veritate matrimonium non fuerit, cùm ambo, tam vir quàm uxor, bona fide conjuncti, credentes se legittimè copulatos esse, cùm sint re vera consanguinitate vel affinitate conjuncti, vel alio modo, quòd matrimonium stare non posset, vel dummodò alter eorum tantum hoc credat. Quia cùm mulier alicui conjugato nubat bona fide, credens eū esse solutū, cū sit alteri mulieri copulatus, & ex eo filios suscipiat, tales legittimi judicātur & hæredes, sive post matrimonium contract' progeniti sunt & nati, sive ante matrimoniū geniti, & in matrimonio nati, sive in

heir is called from the inheritance, and not the inheritance from the heir. Likewise we must first see, what is the inheritance, afterwards who is the true heir, and who ought of several to be preferred.

2. What is an inheritance.

And it is to be known, that an inheritance is the succession to the universal right, which the dead ancestor had from whatever cause of acquisition or of succession, with or without seysine, and if with seysine, at whatever time he was seysed, in his lifetime or at his death, that is on the day on which he died. And if the right descends to several heirs successively and without seysine, nevertheless the heir is entitled to the same seysine, as his ancestor had in his lifetime or at his death. And when the right of property is concurrent with the seysine, forthwith and without delay the freehold is acquired by the heir. f. 63.

3. Who ought to be styled the legitimate heir.

Likewise it is to be seen, who ought to be called the legitimate heir, because according to what is said below, of the children, some are sons and heirs, as for instance, those who are procreated and begotten of lawful marriage, and it is there more fully discussed. But a legitimate heir and son is he, whom marriage demonstrates to be legitimate; as for instance, he who is born of a lawful marriage, or who in the face of the church is reputed legitimate, although in truth there may not have been a marriage, when both, as well the husband as the wife, have been united in good faith, believing themselves to be coupled lawfully, when they are in truth united in consanguinity or in affinity or in some other way, so that the marriage may not stand good, or provided only one of them believes so. Because if a woman marries in good faith a man, who has a wife, believing him to be free, when he is coupled to another woman, and she has sons by him, such sons are judged to be legitimate and heirs, whether they have been begotten and born after marriage has been contracted, or have been begotten before marriage and born in matrimony,

matrimonio geniti, & post matrimonium nati, sive solutum sit matrimonium per mortem parentum, vel in vita parentum ex quacunque causa per divortium, & hoc sive inter parentes publicè contrahantur sponsalia vel matrimonium, dum tamen, si divortium in vita parentum celebretur, vel si inter tales clandestina fuerunt conjugia ab initio, vel contracta contra interdictum ecclesiæ in gradu prohibito etiam ignoranter, soboles de tali conjunctione suscepta prorsus illegittima est censenda, de parentum ignorantia nullum habitura subsidium, cùm illi taliter contrahendo clandestina conjugia, non ex parte sciente,[1] vel saltem affectatores ignorantiæ, videantur. Pari modo proles illegittima est censenda, si ambo parentes, impedimentum scientes legittimum, etiam præter omne interdictum in facie ecclesiæ contrahere præsumpserint, quod quidem non esset, si in facie ecclesiæ hoc facerent ignoranter, uter-
X.c.3.4.3. que scilicet vel eorum alter. Sed in omni casu, ubi
X.c.2.4.17. clādestina sunt conjugia, non excusabit ignorantia, nec etiam si publicè contracta, si hoc fuerit præsumptivè contra interdicta ecclesiæ. Et ad hoc facit decretale, cujus verba hæc sunt: Cùm inter I. virum & V. mulierem divortii sententia sit canonicè prolata, filii eorum non debent exinde sustinere jacturam, cùm parentes eorum publicè & sine contradictione ecclesiæ inter se contraxisse noscantur, ideòque sancimus, ut filii eorum, quos ante divortium habuerint, & qui concepti fuerunt ante latam sententiam, non minùs habeantur legittimi, & quòd in bona paterna hæreditario jure succedant, & de parentum facultatibus nutriantur.

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[1] ex parte scientiæ, MS. Rawl.

or begotten in marriage and born after marriage, or whether the marriage is dissolved by the death of the parents or during the lifetime of the parents from whatsoever cause by a divorce, and this whether the spousals or marriage has been publicly contracted between the parents; provided the divorce be solemnized in the lifetime of the parents, or if there has been between the parties a clandestine marriage from the beginning, or it has been contracted contrary to the interdict of the church within a prohibited degree, even ignorantly, the offspring produced from such an union is to be regarded as altogether illegitimate, and is to have no benefit from the ignorance of the parents, since they seem in contracting a clandestine marriage in such a manner, to have acted, if not knowingly, at least as pretending to ignorance. In like manner the offspring is to be regarded as illegitimate, if both parents, knowing there is a legal impediment, should in spite of every interdict presume to contract marriage in the face of the church, each for instance, or at least one of them, [being aware of it]. But in all cases where the marriage has been clandestine, ignorance will not excuse, nor if it has been publicly contracted, if it has been presumptively against the interdicts of the church. And in support of this the *Decretal*[1] operates, of which the words are—"Since between the man I. and the woman "V. a sentence of divorce has been canonically promul- "gated, their sons ought not therefore to sustain any "loss, since their parents are known to have contracted "with one another publicly and without any contradic- "tion of the church, and therefore we ordain, that their "children whom they had before their divorce, and who "were conceived before sentence was given, are not the "less to be regarded as legitimate, and that they may "succeed by hereditary right to their father's goods, and "be nourished with the means of their relatives."

[1] "Decretal." c. 2. x. qui filii, 4. 17.

4. Qualiter illegittimi legittimantur. Glanville, vii. 15.

Sequitur videre qualiter illegittimi legittimantur; & sciend, q si quis naturales habuerit filios de aliqua & posteà cum ead' contraxerit, filii jam nati per matrimoniū subsequens legittimātur, & ad omnes actus legittimos idonei reputantur, sed tamen non nisi ad ea, quæ pertinent ad sacerdotium, ad ea verò, quæ pertinent ad regnum, non sunt legittimi, nec hæredes judicantur, quòd parentibus succedere possunt, ꝑpter consuetudinem regni, q̃ se habet in contrarium. Spurii verò, qui ex dānato coitu ꝓcreantur à talibus, inter
f. 63 b. quos matrimonium esse non potuit, omni prorsus beneficio excluduntur. Legittimantur etiam quandoque quasi per adoptionem, & de consensu & voluntate parentum, ut si uxor alicujus de alio conceperit quàm de viro suo, & licèt de hoc constiterit in veritate, si vir ipsum in domo sua susceperit, & advocaverit, & nutrierit ut filium, erit hæres & legittimus, vel si expressè non advocaverit, dum tamen illum non amoverit, sive vir omnino ignoraverit, vel sciverit, vel dubitaverit, talis legittimus & hæres judicabitur, eò quòd nascitur de uxore, dum tamen præsumi possit, quòd potuit ipsum genuisse. Et illud idem dici possit de partu supposito, & sic quandoque communis opinio præfertur veritati.

5. De presumptionibus, quod partus debeat esse legittimus, eo quod nascitur ex uxore.

Si autem violenta præsumptio se faciat in contrarium, in prædictis casibus, ut ecce maritus probatur propter aliquam infirmitatem, vel frigiditatem, vel aliam impotentiam coeūdi, per multum tempus non concubuisse cum uxore, vel si probetur quòd extra regnum vel provinciam per biennium & ultra longè extiterit, & quòd vehementer præsumi possit quòd ad uxorem accessum habere non potuit, & cùm redierit prægnan-

4. In what way illegitimate children are legitimated.

It follows to consider how the illegitimate are legitimated, and it is to be known, that if any one has natural children by any woman, and afterwards contracts matrimony with her, the children already born are legitimated by the subsequent marriage, and are reckoned fit for all lawful acts, nevertheless only for those which regard the sacred ministry, but they are not legitimate for those which regard the realm, nor are they adjudged to be heirs who can succeed to their relatives, on account of a custom of the realm, which is of a contrary import. But spurious offspring, which are procreated of a condemned marriage by those, between whom matrimony cannot take place, are excluded from all benefit. But f. 63 b. they are legitimated sometimes, as it were by adoption and with the consent and good will of the relatives, as if any one's wife has conceived by another man than by her husband, and although this is ascertained in truth, if the husband has taken the child into his house and has avowed and nourished it as his son, he will be his heir and legitimate, or if he has not expressly avowed him, provided he has not sent him away, whether the husband was altogether ignorant, or whether he knew the fact or doubted it, such a child will be adjudged to be the heir and to be legitimate, for the reason that he is born of his wife, provided it may be presumed, that he could have begotten him. And the same thing may be said of a supposititious offspring, and so sometimes a common opinion is preferred to the truth.

5. Of the presumptions, that the offspring ought to be legitimate, because it is born of the wife.

But if there be a violent presumption to the contrary in the aforesaid cases, as for instance, if the husband is proved on account of some infirmity or frigidity or impotence of coition for a long time not to have slept with his wife, or if it be proved that he has been outside the realm or the province for two years or a longer time, and that there is a violent presumption that he could not have had access to his wife, and when he returns he finds her pregnant or with a little boy under one year

Britton, l. iii. ch. ii. § 17. Fleta, 13.

tem invenerit vel parvulum habentem anniculum, sive talem advocaverit & nutrierit vel non, erit talis filius (non immeritò) à successione repellendus, quia talis filius nec hæres esse poterit. Sed vice versa, ubi vir sanus erit & incolumis, & semper steterit cum uxore in provincia, in una domo & uno lecto, sive partus conceptus fuit ab alio, sive suppositus, & ipse eum nutrierit & habuerit pro filio, vel etiam ipsum deadvocaverit & amoverit, si posteà ipsum recognoverit ad filium coram viris fide dignis, qui hoc probaverint, si opus fuerit, ulteriùs deadvocare non poterit, sed erit filius legittimus & hæres. Et de hac materia inveniri poterit de termino Paschæ anno undecimo R. H. in comitatu[1] Sussex de Johanne de Monte acuto. Sed esto, q vir talem in vita sua ad hæredem non recognoscat, sed cùm amoverit talem, moriatur, licèt post mortem suam a custode, vel ab aliquo, cujus hæreditas non fuerit, ad hæredem recognoscatur, non valebit. Cùm autem fuerit talis natus vel suppositus, vir statim talem à domo sua amoveat, nec faciat eum nutriri in domo sua pro filio, nec alibi, nec permittat eum redire ad ipsum. Et de hac materia inveniri poterit de termino Sancti Michaelis anno R. H. quarto incipiente quinto, comitatu Lincolñ de Barthoł filio Richardi, & ubi tenens paratus fuit se ponere in magnam assisam, vel super patriam, de jure; utrum ipse haberet majus jus tenendi terram in dominico, quæ petita fuit, an ille qui petiit, sicut ille qui non habebatur pro filio à patre communi, nec nutritus pro filio in domo patris, sed amotus domo patris, & sicut ille, qui nunquam rediit ad patrem in vita sua, sicut filius, nec post mortem ad capitales dominos feodi, facturus eis

Novell. 117, c. 2.

[1] "anno R. H. undecimo comitatu," MS. Rawl.

of age, whether he has avowed and nourished him or not, such a son is deservedly to be rejected from the inheritance, for such a son cannot be heir. But conversely, if the father be healthy and sound, and has always stayed with his wife in the province, in one house and in one bed, whether the offspring has been conceived of another man or be supposititious, and he has nourished it and treated it as his son, or has even disavowed it and sent it away, if he has subsequently acknowledged it as his son in the presence of trustworthy persons, who can prove it, if it be necessary, he cannot further disavow it, but it will be his legitimate son and heir. And on this subject a case may be found in Easter Term in the eleventh year of king Henry, in the county of Suffolk, concerning John Montague. But let it be that the husband has not recognised such a one in his lifetime as his heir, but when he has sent him away, dies, although he may be recognised after his death by the guardian or by some one, to whom the inheritance does not belong, it will not avail. But when such a child has been born or substituted, let the husband at once remove such a child from his house, nor let him be brought up in his house nor elsewhere as his son, nor let him return to him. And on this subject a case will be found in St. Michael's Term, in the fourth and fifth year of the reign of king Henry, in the county of Lincoln, in the case of Bartholomew Richardson, and where the tenant was prepared to put himself on the great assise, or on the country, on the question of right, whether he had more right to hold the land in domain which was claimed, or the claimant, since the latter was not held by their common father to be his son, nor was he brought up in the father's house, but had been sent away from the father's house, and since had never returned to the father in his lifetime like a son, nor after his death to the chief lords of the fee, to do in regard to them that which he ought

quod de jure facere deberet, & in quo casu tenens retinuit sine assisa, jurata, vel inquestione, quia petens non potuit premissa dedicere.

Cap. XXX.

f. 64. 1. De statu et differentia liberorum. Britton, l. vi. ch. i. § 2. Fleta, p. 370.

Quia dictum est suprà, quòd naturales, & legittimi vocantur præ aliis ad successionem, non est inutile videre statum & differentiam liberorum, quæ quidem multiplex est. Liberorum autem, secundùm quod prædictum est, quidam sunt naturales & legittimi, qui ex justis nuptiis & legittima uxore procreantur. Item quidam naturales tantùm & non legittimi, sicut sunt illi qui procreantur & nati sunt de legittima concubina, cum qua tempore procreationis posset esse matrimonium, sicut de soluto & soluta. Quidam verò nec legittimi, nec naturales, qui nati sunt ex prohibito coitu, ex talibus videlicet, inter quos non posset esse matrimonium tempore procreationis, sicut sunt spurii, qui ad nihilum apti sunt. Item eorum, qui legittimi sunt & naturales, quidam sunt filii & hæredes, sicut sunt illi, quibus descendit aliqua hæreditas, ex parte patris, vel ex parte matris, vel ex parte utriusque, in dominico vel in servitio. Item eorum quidam sunt filii & non hæredes unius, sed filii secundùm quod hæreditas descendit tantùm ex parte patris, vel ex parte matris. Item eorum, quidam sunt legittimi filii & naturales, sed nullius hæredes, quia ex nulla parte descendit eis hæreditas aliqua. Item eorum, quidam incipere possunt esse hæredes & desinere, & quidam non. Item eorum, qui sunt naturales, legittimi & hæredes, quidam sunt propinqui & quidam propinquiores, & quidam remoti & quidam remotiores, & omnes, quotquot sunt, sunt hæredes recti & justi, quotquot de-

to do of right, and in which case the tenant retained the land without an assise, or a jury, or an inquest, because the claimant could not gainsay the abovesaid facts.

Chapter XXX.

f. 64. 1. Of the state and difference of children.

Since it has been said above, that natural and legitimate children are called before others to the succession, it will not be without use to consider the state and the difference of children, which is indeed manifold. For of children, according to what is above said, some are natural and legitimate, some are procreated of a legal marriage and a legitimate wife. Likewise some are natural only and not legitimate, as those who are procreated and born of a legitimate concubine, with whom there might be a marriage at the time of procreation, as of a free man and a free woman. Some, however, are neither legitimate nor natural, who are born of a prohibited coition, of such, for instance, between whom there could not be marriage at the time of procreation, such as spurious offspring, who are fit for nothing. Likewise of those, which are legitimate and natural, some are sons and heirs, such as those, to whom some inheritance descends, either on the father's side or on the mother's side, or on both sides, in domain or in service. Likewise of those some are sons and not heirs of one [of the parents], but sons according as the inheritance descends only from the father's side, or from the mother's side. Likewise of those some are legitimate and natural sons, but heirs of neither parent, because no inheritance descends to them from either side. Likewise of them, some may begin to be heirs and may begin to cease, and some not. Likewise of those which are natural, legitimate and heirs, some are near heirs and some are nearer, and some are remote and more remote, and all, how many there may be, are right and just heirs as many

scendunt gradatim à communi stipite primò per lineam directam descendentem in infinitum, & posteà per lineam transversalem descendendo in infinitum, illis deficientibus qui sunt in linea recta, & ultimò, cū illi defecerint qui sunt in linea transversali descendendo, vocantur illi qui sunt in linea transversali ascendendo tantū, quia p lineam rectam ascendendo, per quā jus descendit propter mortem antecessorum, jus illud nunquam per eandem lineam reascendit, & quamvis omnes sic in infinitum ascendendo & descendendo recti sunt hæredes & justi, tamen non omnes simul vocantur ad successionem, quia propinquior excludit propinquum, i. propinquus remotum, remotus remotiorem. Quibus etiam omnibus deficientibus, vel propter defectum vel propter delictum, revertitur jus de necessitate ad eum qui feoffavit, scilicet ad dominum capitalem, cùm aliam viam non inveniat, & evanescit homagium, secundùm quod inferiùs pleniùs dicetur de eschaetis. Item hæredum, quidam sunt sub potestate parentum & infra ætatem, quidam sunt sui juris & plenæ ætatis, ut si fuerint emancipati vel forisfamiliati in vita parentum, & post mortem, quidam eorum sunt plenæ ætatis & sui juris, & quidam infra ætatem & sub tutela sive custodia capitalium dominorum, & quidam sub cura parentum propinquorum, secundùm quod inferiùs dicetur.

2. De qualitate hæredum, qui propinqui sunt et propinquiores, et de eorum seysina.

De eo autem quod superiùs dicitur, quòd hæredum quidam sunt propinqui, & quidam propinquiores, sciendum est, quòd si quis habuerit plures filios, omnes sunt hæredes propinqui, postnatus sicut antenatus, quantum ad seysinam parentum, & pares in jure possessionis; dum tamen postnatus (per negligentiam vel patientiam antenati) in seysina per tantum tempus extiterit, quòd f. 64 b. à seysina sine judicio ejici non possit, & sine brevi, quia ex tunc pares sunt in jure, & par parem non

as descend step by step from the common stock, first by the direct line descending infinitely, and afterwards by the transverse line descending infinitely, upon those failing who are in the direct line, and in the last place, when those have failed, who are in the transverse line descending, those are called, who are in the transverse line ascending only, because by the direct line ascending, by which line the right descends by reason of the death of ancestors, that right never reascends by the same line; and although all in this manner by ascending and descending infinitely are right and just heirs, nevertheless all are not called simultaneously to the succession, because the nearer excludes the near, the near excludes the remote, and the remote excludes the more remote. All of whom failing, either from defect or from delict, the right returns of necessity to him who granted the fief, that is to the chief lord, since it can find no other way, and the homage vanishes, according to what shall be said below of escheats. Likewise of heirs some are in the power of relatives and below age, some are independent and of full age, as if they have been emancipated or set free from the family in the limetime of their parents, and after their death some of them are of full age and independent, and some below age and under the guardianship or the wardship of chief lords, and some under the care of near relatives, according as will be explained below.

2. Of the quality of heirs, who are near, and who are nearer, and of their seysine.

But concerning that which has been said above, that some heirs are near and some are nearer, it is to be known that if a person has several sons, they are all near heirs, the after-born like as the first-born, as far as regards the seysine of the parents, and they are peers in right of possession, provided however that the after-born (through the negligence or sufferance of the elder-born), if he has been for a certain time in seysine, cannot be ejected from his seysine without a judgment and without a writ, because they are thenceforth peers in right, and peer f. 64 b.

ejicit, in jure possessionis. Sed extunc recurend erit ad jus ꝑprietatis, secundùm q̃ inferiùs dicitur in assisa mortis antecessoris. Si autem postnatus post mortem antecessoris se priùs posuerit in seysinam quàm antenatus, si statim ejiciatur, non recuperabit per assisam novæ disseysinæ, quia libeꝝ tenementum habere non potuit, nisi ex lõgo tempore & pacifica possessione vel seysina, ꝑpter jus proprietatis, quod est cum antenato. Si autem statim ejici non possit, ad interrumpendam possessionem suam, sed antenatus statim ĩpetraverit sibi per assisam mortis antecessoris, & diligenter ꝑsequutus fuerit, tamen non procedit assisa inter eas, sicut inter alias quascunq; personas, quia sunt de uno stipite, quamvis pares sunt quoad jus possessorium, antenat^{9} & postnatus, tamen possessio postnati nulla est, cùm sit interruptio per diligentem impetrationem & diligentem prosequutionem antenati. Cùm sit igitur hæres propinquus, poterit esse hæres remotus, est autem hæres remotus, ut si quis haberet plures filios, & unicam filiam, masculi erunt hæredes propinqui & filia hæres remota. Si autem plures filios & nullam filiam, sed nepotes ex filiis, filii erunt hæredes propinqui, & nepotes hæredes remoti. Item dici poterunt remotiores respectu hæredum remotoꝝ, sicut ꝑnepos, abnepos, atnepos, trinepos, & sic ulteriùs descendendo in infinitum linea recta. Si autem filii & filia, & neptes defecerint, tunc erit hæres ꝑpinquus frater & soror ei, qui fuerit in seysina hæreditatis. Si autem filios habuerit, deficiente filia & nepotibus, erit avunculus vel amita in linea transversali hæres remotus, & omnes ex illa pro-

does not eject peer, in right of possession. But thenceforth we must have recourse to the right of property, according to what is said below in the assise of the death of an ancestor. But if the after-born, after the death of the ancestor, has put himself into seysine before the elder-born, if he be forthwith ejected, he shall not recover by an assise of novel disseysine, because he cannot have a freehold, except from length of time and peaceable possession or seysine, on account of the right of property, which is with the earlier-born. But if he cannot be ejected forthwith, to interrupt his possession, but the elder-born has forthwith claimed it for himself by an assise of the death of an ancestor, and has diligently prosecuted his suit, nevertheless the assise does not proceed between them, as between any other persons, because they are sprung from one stock, although they are peers as regards their right of possession, the elder-born and the younger-born, nevertheless the possession of the younger-born is null, since there is an interruption of it by the diligent demand and the diligent prosecution of the suit of the elder-born. Since there is thus a near heir, there may be a remote heir. But there is a remote heir, as if a person shall have several sons and an only daughter, the male heirs will be near heirs, and the daughter will be a remote heiress. But if he have several sons and no daughter, but grandsons by his sons, the sons will be near heirs, and the grandsons will be distant heirs. Likewise some may be called more distant in reference to distant heirs, as a great grandson, a great grandson's son, a great grandson's grandson, a great grandson's great grandson, and so descending lower for ever in the right line. But if a son or a daughter fails, and grand-daughters fail, then the sister or the brother will be the near heir to him, who was in the seysine of the inheritance. But if he has had sons, if his daughter and grandchildren fail, his uncle or his aunt will be his remote heir in the transverse line, and all descending

venientes in eadem linea transversali erunt hæredes remotiores; filiis autem & filiabus, nepotibus, avunculo, & amita deficientibus, tunc erit proavunculus, & ꝑamita hæres ꝑpinquus, & alii superiores remoti & remotiores. Item sunt propinqui & ꝑpinquiores, propinquior autem dici poterit ille, ad quem jus proprietatis immediatè post mortem antecessoris descendit, vel propter ætatem. Vt si quis plures haberet filios, jus ꝑprietatis semꝑ descendit ad primogenitum, eò quòd ipse inventus est primò in rerum natura, & alii remanebunt ei propinqui vel propinquiores, secundùm q̃ liberos habuerit vel non habuerit. Si autem in vita patris antenatus decesserit sine hærede de se, frater postnatus locū suū obtinebit, & incipiet esse patri communi hæres ꝑpinquior, & alii postnati ꝑpinqui, & sic fiet de aliis in infinitū. Si autem frater antenatus in vita patris communis obierit, relicto hærede de se, nepos vel neptis ex eo incipiet esse in potestate avi, & hæres propinquior avo, propter jus proprietatis quod ei descendit, quamvis gradu remotior, & unde si avunculus vel amita hæres propinquus & non propinquior, (quamvis gradu ꝑpinquior,) extra seysinam petat versus nepotem vel neptem, qui fuerit in seysina, obstabit eis exceptio ꝑprietatis, & q̃ hæredes propinquiores esse non poterunt avunculus vel amita. Et eodem modo, si petant versus extraneas personas, obstabit exceptio proprietatis, quia nepos vel neptis, vel alius majꝰ jus habuit. Si autem avunculꝰ vel amita, priùs quā nepos vel neptis, se posuerint in seysinam, tunc fiet per omnia, secundùm
f. 65. quod dicitur superiùs de fratre postnato, quòd ꝑcedit inter eos breve de consanguinitate, vel de recto, secun-

from them in the same transverse line will be more distant heirs; but if sons and daughters, grandchildren, and uncles and aunts fail, then the great-uncle and the great-aunt will be the next heir, and others above them remote or more remote. Likewise there are near heirs and nearer heirs, but he may be called a nearer heir, to whom the right of property forthwith descends after the death of the ancestor, or on account of age. As if a person should have several sons, the right to the property always descends to the eldest-born, on the ground that he is found first of all in the nature of things, and the others will remain near or nearer to him, according as he has had children or not. But if during the lifetime of the father the elder-born has died without an heir from his body, the next-born son will take his place, and will begin to be a nearer heir to the common father, and the other sons near heirs, and so it will be of the others without end. But if the elder-born brother die in the lifetime of the common father, having left an heir of his body, the nephew or niece of his body will begin to be in the power of the grandfather, and a nearer heir to the grandfather, on account of the right to the property which descends to him, although he is more remote in degree; and hence if the uncle or the aunt as near heir, and not as nearer heir (although he may be nearer in degree), being out of seysine, claims it against the nephew or the niece, who is in seysine, the objection of property will be in their way, and that the uncle and aunt cannot be nearer heirs. And in the same way if they claim against strangers, the objection of property will be in the way, because the nephew or the niece or some other person has had more right. But if uncle or aunt have put themselves into seysine before the nephew or the niece, then there will take place in every respect, according to what has been said above concerning an after-born f. 65. brother, that there must be taken out between them a writ of consanguinity or a writ of right, according as the

dùm q avunculus vel amita longam seysinā vel brevem habuerit. Et quod dicitur de fratre postnato, avunculo, vel amita hæredibus propinquis, observetur de omnibus aliis hæredibus ꝑpinquis in casu consimili.

3. Quid faciat hæredem propinquiorem.

Item sexus facit hæredem ꝑpinquiorem, ut si quis hæreditatem habens & uxorem, genuerit ex se filium vel filiam unam, vel plures, si omnes fuerint hæredes antecessoris, masculus sexus semper in successione præferri debet sexui fœmineo; nunquam enim ad successionem vocatur fœmina, quamdiu aliquis hæres superfuerit ex masculis, nisi cōtrarium faciat modus donationis, ut ecce: Aliquis dat alicui terram in maritagium cum filia sua & hæredibus de corpore suo ꝑcreatis, ꝑcreatur filia, moritur maritus, alius ducit matrē in uxorē, generat ex ea filium, moritur mater, filia ꝑpinquior erit hæres, & excludit masculum à successione, & sic facit modus donationis filiam hæredem ꝑpinquiorem, & excludit à successione sexum masculum. Item eodem ꝓmodo, facit linea hæredem ꝑpinquiorem fœminam, in linea recta descendentem, & excludit masculum in linea transversali; ut si quis filiam habuerit, vel filium, & ex eo nepotem vel fratrem, filia vel neptis fratri præfertur in successione, propter lineam rectam, quæ præfertur transversali. Item sanguis facit hæredem ꝑpinquiorem, & jus sanguinis excludit masculum, & præfertur fœmina, ut ecce: Aliquis ducit uxorem, & ex ea generat filium & filiam, & mortua ea, posteà ducit aliam, de qua generat filium, mortuo patre descendit hæreditas antenato filio de prima uxore, moritur seysitus sine hærede de se, dominus capitalis ponit se in seysinam, soror de eodem patre & eadem matre petit per assisam de seysina fratris sui, & frater de alia uxore

uncle or the aunt has had a long or a short seysine. And what is said of an after-born brother, uncle or aunt, as near relatives, must be observed in the case of all other near heirs in a similar case.

3. What constitutes a nearer heir.

Likewise sex makes a nearer heir, as if any person having an inheritance and a wife, begets of himself a son or a daughter or several, if they shall all be heirs of their ancestor, the male sex ought to be preferred always in the succession to the female sex, for a female is never called to the succession, as long as any heir exists of the male sex, unless the mode of the donation rules to the contrary, as for instance: A person gives to another person land in maritage with his daughter and to the heirs begotten of his body; a daughter is begotten, the husband dies, another person marries the mother, begets a son out of her, and the mother dies, the daughter will be the nearer heir, and excludes the male from the succession, and so the mode of the donation makes the daughter the nearer heir, and excludes the male sex from the succession. Likewise in the same manner the line makes a female the nearer heir, descending in the direct line, and excludes the male in the transverse line; as if a person has had a daughter or a son, and out of him a nephew or a brother, the daughter or the niece is preferred to the brother in the succession on account of the right line, which is preferred to the transverse. Likewise blood makes a heir nearer, and the right of blood excludes the male, and the female is preferred, as for instance: A certain person marries a wife, and out of her begets a son or a daughter, and upon her death, afterwards marries another, from whom he begets a son, upon the death of the father the inheritance descends to the first-born son of the first wife; he dies seysed without an heir of his body, and the chief lord puts himself into seysine; the sister by the same father and the same mother claims by an assise upon the seysine of her brother, and the brother by the other

eodem modo, soror de eodem patre & eadem matre obtinebit, & jus sanguinis excludit masculum. Item jus sanguinis eodem modo facit hæredem ꝑpinquiorē, & excludit tam sexum masculinum à successione, quam fœmininū. Verbi gratia: Quidam duxit quandam in uxorem, & ex ea generat filium vel filiam, posteà, mortua prima uxore, ducit aliam, de qua generat filium vel filiam, filiꝰ de secunda uxore facit acquisitum, moritur sine hærede de se, soror de secunda uxore petit per assisam, frater vel soror de prima uxore eodem modo; soror de secunda uxore obtinebit, & excludit tam masculum quàm fœminam ex prima, q̄ verum est. Sed ea quæ dicta sunt, secundùm quosdam, locum habent de perquisito in utroque casu, de hæreditate verò descendente aliud erit; quia habito respectu ad communem antecessorem talium, de quo hæreditas descendit, jus proprietatis nunquam respiciet fœminam, dum tamen ibi masculus fuerit vel ꝑveniens ex masculo, sive hæredes ꝑcreati fuerint ex uno patre & una matre, vel diversa. Et q̄ dicitur de hæredibus propinquioribus & propinquis, observari debet in omni consimili casu, in omnibus aliis hæredibus, remotis & remotioribus. Et de hac materia inveniri poterit casus expressus, de termino Sanctæ Trinitatis anno regni regis H. ĩtio, in comitatu Sussex. Assisa mortis antecessoris si Radulphꝰ de la Roche. Itē de Wilhelmo de Maundevill comite Essex et Matilda comitissa Hereford. Et ad hoc facit, de ĩmino Sancti Michaelis añ
f. 65 b. regni regis Hēnici quarto incipiēte quinto in comitatu Lincolñ, de Ozberto filio Richardi & Bartholomeo fratre suo, ubi frater postnatus fuit in seysina & retinuit. Quod autem idem observari debeat de hæreditate de-

wife in the same manner; the sister by the same father and by the same mother shall obtain [the inheritance], and the right of blood excludes the male. Likewise the right of blood in the same manner makes a nearer heir, and excludes the male sex as well as the female from the succession. For instance, a certain person married a certain woman for his wife, and begot of her a son and a daughter, afterwards the first wife being dead, he marries another, of whom he begets a son or a daughter, the son by the second wife makes an acquisition, and dies without an heir [begotten] by himself, the sister by the second wife claims by an assise, and the brother or sister by the first wife in the same way; the sister by the second wife shall obtain [the inheritance], and excludes as well the male as the female by the first wife, which is true. But those things, which have been said, according to some, have a place in acquired property in either case, but it will be otherwise in a descending inheritance, because regard being had to the common ancestor of such persons, from whom the inheritance descends, the right of property will never regard the female, as long as there be a male or the offspring of a male, whether the heirs have been procreated from one father and one mother, or a different mother. And what is said of near heirs and of nearer heirs ought to be observed in every similar case, in the case of all other heirs, remote and more remote. And on this matter an express case may be found in Holy Trinity term in the third year of the reign of king Henry, in the county of Sussex. The assise of the death of an ancestor, if Randolf de la Roche. Likewise of William of Maundevill, count of Essex, and Matilda countess of Hereford. And f. 65 b.
for this makes [a case] in St. Michael's term, in the fourth and fifth year of the reign of king Henry, in the county of Lincoln, concerning Osbert son of Richard, and Bartholomew his brother, where the younger-born brother was in seysine and retained it. But it seems

scendente, quod de perquisito observatur, videtur, cùm quilibet de seysina ꝑpria facit stipitem & primum gradum, sed re vera non est ita. Verbi gratia: Aliquis habet duos filios ex diversa matre & duas filias, frater antenatus erit patri suo ꝑpinquior hæres, & filius postnatus post eum propinquus, & filiæ hæredes remotæ. Cùm autem hæreditas descenderit filio antenato ut hæredi propinquiori, frater postnatus incipit esse hæres propinquior fratri antenato, sorores hæredes ꝑpinqui. Mortuo igitur fratre antenato sine hærede de se, descendit hæreditas ꝑpinquiori hæredi, hoc est fratri postnati, & nọn filiabus, licèt sunt hæredes ꝑpinqui, nec est multum curandum, utrum sint de eodem patre & eadem matre, vel diversa. Si autem frater antenatus de prima uxore, vel postnatus de secunda uxore, perquisitum fecerit, si sororem habuerit de eadem matre, ꝑpt̃ jus sanguinis duplicatum tam ex parte patris, quàm ex parte matris, dicitur hæres ꝑpinquior soror, quàm frater de alia uxore, licèt sit hæres propinquus. Possunt quidem esse pares quoad jus possessionis, cùm postnati liberum teneñtū acquisierint ex tempore, vel impares ante. Item eodem modo quoad jus sanguinis q poterint hæredes esse pares, cùm fuerint de uno patre vel de una matre, a quib⁹ jus descēdit. Si autem de diversis tunc impares. Et erit propinquitas sanguinis, sicut propinquitas successionis. Refert etiam à quo fiat perquisitum, utrum ab extranea persona, vel a patre communi, vel ab alio antecessore sicut à fratre antenato. Et poni poterit casus in ꝑsona trium fratrum. Verbi gratia: Sit quòd pater communis

that the same thing, which is observed in the case of acquired property, ought to be observed in the case of a descending inheritance, when a person of his own seysine makes a stock and a first degree, but in truth it is not so. For illustration: A certain person has two sons from a different mother, and two daughters, the elder-born brother will be the nearer heir to his father, and the younger-born brother after him the near heir, and the daughters the remote heirs. But when the inheritance has descended to the firstborn son as the nearer heir, the after-born son will be the nearer heir to his elder brother, and the sisters will be the near heirs. But when the elder-born brother has died without a son of his body, the inheritance descends to the nearer heir, that is, to the after-born brother, and not to the daughters, although they are near heirs, nor is there much concern whether they be from the same father and the same mother, or a different mother. But if the elder-born son of the first wife, or the after-born son of the second wife has made an acquisition, if he has had a sister of the same mother, on account of the double right of blood as well on the father's side as on the mother's side, the sister is called the nearer heir than the brother by the other wife, although he be a near heir. They may be even equal as regards the right of possession, when the after-born have acquired a freehold from time, or they may have been unequal before. Likewise in the same manner as regards the right of blood, they may be equal heirs, when they are sprung from one father or one mother, from whom the right descends. But if from different mothers, then they are unequal. And as is nearness of blood, so will be nearness of succession. For it matters from whom the acquisition is made, whether from an extraneous person, or from a common father, or from another ancestor, such as an elder-born brother. And a case may be supposed of three brothers. For illustration's sake: let it be that a common father

feoffavit filium antenatum, qui est hæres suus ꝑpinquior, & mortuo primogenito sine hærede de se, antequam hæreditas acciderit ei, succedit ei frater medius de ꝑquisito, sicut hæres propinquior, & erit frater postnatus tunc fratri medio hæres propinquior. Et si in vita primogeniti descendit ei hæreditas patrua, & de ꝑquisito homagium intervenerit, statim pertinebit ad fratrem medium successio & jus successionis, cùm primogenitus de perquisito non possit hæres esse & dominus. Non enim possunt simul stare perquisitum & dominium, ꝑp̃ homagium; homagium enim expellit ꝑquisitum. Si autem ꝑquisitum factum fuerit ab extraneo vel ab alio vz. quàm à cōmuni antecessore, si hæreditas supervenerit, homagiū factum ex ꝑquisito extraneæ ꝑsonæ non expellit ꝑquisitum, quia in hoc casu non erit primogenitus hæres & dominus. Esto enim, q̃ facta sit donatio fratri postnato à patre cōmuni vel fratre antenato, & eo mortuo sine hærede de se, erit frater antenat⁹ hæres ꝑpinquior fratri postnato, & cum eo remanebit hæreditas si homagiū non intervenerit, & quāvis homagiū int̃venerit, & hæreditas paterna ei descenderit, sēper habebit antenat⁹ primā seysinā ꝑ assisam mortis antecessoris, si capitalis dn̄s vel alia extranea ꝑsona fuerit in seysina. Si autem frater medius se pri⁹ posuerit in seysinā, tunc consulitur antenato per breve de recto, & cùm antenat⁹ seysinam
f. '66. habuerit & homagium intervenerit, si sit hæres ꝑpinquior antenato qui petat, non poterit seysina cum eo remanere, ratione supradicta, sed descendit jus primo filio vel filiæ liberis antenatis, si liberos habuerit, &

has granted a fief to an elder-born son, who is his nearer heir, and the elder-born having died without an heir of his body before the inheritance has devolved to him, the intermediate son succeeds to him as regards his acquired property as the nearer heir, and then the third son will be the nearer heir to his intermediate brother. And if in the lifetime of the first-born brother the father's inheritance descends to him, and homage for the acquired property has intervened, the succession and the right of succession will at once belong to the intermediate brother, since the elder-born cannot be heir to the acquired property and lord. For the acquired property and the lordship [over it] cannot stand together, on account of the homage; for the homage expels the acquired property. But if the acquired property has been acquired from a stranger, or from another person than a common ancestor, if the inheritance supervenes, homage performed to a stranger for the acquired property does not expel the acquired property, for in this case the elder-born will not be the heir and the lord. For let it be that a donation has been made to an after-born brother by a common father or by an elder-born brother, and upon his death without an heir of his body, the elder-born brother will be the nearer heir to his after-born brother, and the inheritance will remain with him, if homage has not intervened, and although homage has intervened, and the paternal inheritance has descended to him, the elder-born will always have the first seysine by an assise of the death of the ancestor, if the chief lord or another extraneous person has been in the seysine. But if he has first put himself into seysine, then the remedy f. 66.
for the elder-born is by a writ of right, and when the elder born has had seysine and homage has intervened, if the claimant be the nearer heir to the elder-born, the seysine cannot remain with him for the reason above said, but the right descends to the first son, or to the eldest children of the daughter, if she had children, and the

consulitur eis, si petere velint seysinam, per breve de recto, facta narratione & computatione de seysina fratris postnati. Si autem liberos non habuerit frater antenatus, tunc statim fit descensus jure ad fratrem medium, et competit ei actio per breve de recto, sicut competit liberis supradictis. Sed quid, si, dum frater medius petierit, incipiat frater antenatus hæredes procreare, talibus procreatis cadit actio fratris, et incipit actio competere pueris. Sed si frater ante procreationem puerorum seysinam recuperaverit, non ꝑpt̃ hoc erit seysina auferenda, sed ei & hæredibus suis imperpetuum remanebit. Et vice versa, si cùm ab initio antenatus pueros habuerit et agere inceperint, et pendente placito esse desierint, extunc statim incipiet actio in persona fratris medii, sicut ab initio, si pueri non extarent, et idem jus q̃ cōpetit fratri medio, competit hæredibus suis in infinitum. Item esto, quòd frater medius, cùm seysinam acquisierit, sine hærede de se moriatur, adhuc illud idem erit dicendū de fratre medio, q̃ dictum est de fratre postnato, s. quòd frater antenatus est ejus hæres ꝑpinquior. Sed quid si sine hærede fratres decesserint, ut prædictum est, nec antenatus habuerit liberos, tunc vocandi sunt remotiores. Et quid, si nulli omnino apparuerint hæredes, qui petant? sic poterit seysina remanere cum antenato, non obstante homagio; quia licet actio non deficiat neq̃ jus, deficit tamen probatio, cùm non sit, qui petat. Item esto, quòd frater medius fecerit perquisitum, et moriatur sine hærede de se, et capitalis dominus sive extraneus se posuerit in seysinam, adhuc competit

remedy for them, if they wish to claim seysine, is by a writ of right, an account and computation having been made of the seysine of the after born-brother. But, if the elder-born brother has had no children, then forthwith there is a descent by right to the intermediate brother, and he is entitled to an action by a writ of right, like the aforesaid children. But what, whilst the intermediate brother is a suitor, the elder-born brother begins to beget heirs, upon the birth of such the brother's action comes to an end, and a right of action begins to attach to the sons. But if the brother before the procreation of the sons has received seysine, his seysine is not on that account to be taken away from him, but will remain for ever with him and his heirs. And conversely, if from the commencement the elder-born has sons, and they began an action, and whilst the plea was pending they ceased to be, from that moment forthwith will begin an action in the person of the intermediate brother, as from the commencement, if there had been no sons, and the same right, which appertains to the intermediate brother, appertains to his heirs in an infinite line. Likewise let it be, that the intermediate brother when he has acquired seysine, dies without an heir of his body, still the same will have to be said of the intermediate brother, which has been said of the after-born brother, namely, that the earlier-born brother is his nearer heir. But what, if the brothers have died as aforesaid without an heir, and the elder-born has no children, then the more remote are to be called. And what, if no heirs appear to claim? Under such circumstances the seysine will remain with the elder-born, notwithstanding the homage; for although neither the action nor the right fails, the proof is wanting, since there is no one, who can claim. Likewise, let it be, that the intermediate brother makes an acquisition, and dies without an heir of his body, and the chief lord, or a stranger puts himself into seysine, an assise of the death

assisa mortis antecessoris fratri antenato, non obstante homagio, & non fratri postnato, & cùm per assisam recuperavit antenatus, extunc competit actio per breve de recto, vel pueris antenatis, vel fratri postnato, modo quo prædictum est, & non ut ex tali placito procedatur ad magnam assisam vel duellum, sed quòd fiat propinquitatis & parentelæ computatio. Sed quid, si postnatus frater primā seysinam habuerit pacificam, et tempus, quòd sine brevi ejici non possit & sine judicio, extunc competit actio fratri antenato & ejus hæredibus, si ipse præmoriatur, per breve de recto, ut facta computatione, sciatur, quis eorum sit hæres propinquior; quo probato, non erit postnatus, ut videtur, per judicium ejiciend^{9}, quia si constiterit quòd frater antenatus sit hæres propinquior, tamen (quia homagium intervenerit) judicandum erit in eodem judicio, quòd postnatus in seysina remaneat, cùm seysina cum antenato non poterit remanere propter homagium, nec alia actione opus erit per breve de recto, quòd super eodem jure inter easdem personas veniat actio super actionem, non magis quàm assisa super assisam, sed cùm frater antenatus ab initio fratrem postnatum recenter ejicere vellet, vel si non possit, & statim sibi acquirit per assisam mortis antecessoris, antequam postnat^{9} liberum tenemtum habere poterit ex tempore, si p assisam obtineret antenat^{9} in jure possessorio & in causa possessionis, nihilominùs sequi posset actio in psona postnati
f. 66 b. super jure proprietatis, nisi sit qui dicat, quòd contra assisam & contra actionem per breve de recto posset postnatus defendere se per exceptionem, s. quòd ante-

of the ancestor is available to the elder-born brother, notwithstanding the homage, and not to the after-born brother; and when the elder-born has recovered by an assise, thenceforth an action by a writ of right is available either to the elder-born sons or to the after-born brother, in the manner as aforesaid, and not that upon that plea they should proceed to the great assise or the duel, but that there should be a computation of nearness of kin and of relationship. But what if the after-born brother has had a first and peaceable seysine and time, so that he cannot be ejected without a writ and without a judgment, thereupon the elder-born brother, and his heirs, if he himself predeceases, are entitled to an action by a writ of right, that, a computation having been made, it may be known which of them is the nearer heir: upon proof of which, the after-born, as it seems, will not have to be ejected by a judgment, for if it be established that the elder-born brother is the nearer heir, nevertheless (because homage has intervened), it will have to be adjudged in the same judgment, that the after-born [brother] remain in seysine, since the seysine cannot remain with the elder-born because of the homage, nor will there be any need of another action by a writ of right, that upon the same question of right between the same parties action should succeed action, any more than assise should succeed assise, but when the elder-born brother from the commencement is desirous to eject recently the after-born brothers, even if he cannot, and forthwith acquires for himself by an assise of the death of the ancestor, before the after-born brother can have the freehold from time, if the elder-born should obtain it by an assise in possessory right and in a cause of possession, nevertheless an action could follow in the person of the after-born brother upon the right of possession, unless there be some one who says, that against an assise and against an action by writ of right the after-born brother can defend himself by an ex- f. 66 b.

natus non possit simul esse hæres & dominus. Item propinquiores hæredes esse possunt plures, sicut unus, & cuilibet jus descendit, quasi uni hæredi, ꝑpter juris unitatem, sicut sunt plures filiæ ꝑvenientes de eodem patre & eadem matre, à quibus descendit hæreditas, & ubi omnes simul & insolidum hæredes sunt, eò quòd masculus non apparet, & non refert utrum eundem habuerint patrē & eandem matrem, vel diversos, habita tamen distinctione, secundù q̃ prædictum est, utrum sit hæreditas descendens vel perquisitum, et utrum fuerit de uno et eodem patre et eadem matre, vel diversis, et erit hæreditas inter illas dividenda in omnibus, quæ recipiunt divisionem ratione personarum, pro virilibus portionibus, sed non ratione rei. Qualiter autem homagium facere debent, & quibus, et quando, et quomodo, et à quibus accipi debeat, infra pleniùs dicetur de homagiis. Item possunt esse hæredes propinquiores plures in una hæreditate, masculi sicut fœminæ, sed non ratione personarum, sed ratione rei, et non simul et insolidum, sicut fœminæ et sicut unus hæres, sed sicut hæredes plures participes, & sicut partem capientes. Sunt autem hæredes & cohæredes, & cohæredum quidam sunt participes, et quidam non, s. nullam partem cum hæredibus capientes. Item possunt esse plures hæredes fœminæ et participes, tam ratione personarum, quàm rei, ut si quis teneat hæreditariè terram aliquam, quæ partibilis sit, et habuerit plures filias et hæredes, et sic erunt filiæ hæredes ꝑpinquiores, quia participes hæreditatis & capaces. Poterit etiam quis habere plures filias de una matre, et plures de alia, et sic sint omnes participes et capaces hæreditatis paternæ descendentis, quantum ad hæreditatem paternam descendentem, non erunt tamen

ception [of law], namely that the elder-born cannot be at the same time heir and lord. Likewise, the nearer heirs may be several as one, and the right descends to each of them as to one heir, on account of the unity of right, such for instance as several daughters springing from the same father and the same mother, from whom the inheritance descends, and where all are together heirs to the entirety, from the circumstance that no male is apparent, and it does not matter whether they have the same father and the same mother, or divers, the distinction however being observed according to what has been said above, whether it be a descending inheritance or an acquisition, and whether it be from one and the same father and the same mother, or from divers, and the inheritance will have to be divided amongst them in all things, which allow of division with reference to persons, according to each person's portion, but not with reference to the thing. But in what ways they ought to do homage, and to whom, and when, and in what mode, and by whom it ought to be received, will be said below in the chapter upon homage. Likewise there may be several next heirs in the case of one inheritance, male as well female, but not with regard to persons, but with regard to the thing, and not together and to the entirety, as females and as a single heir, but as several heirs partaking of it and taking a part. There are likewise heirs and co-heirs, and of co-heirs some are parceners with others and some not, that is, taking no part with the heirs. Likewise there may be several heirs female and parceners, as well with regard to persons as to the thing, as if any person holds land by hereditary tenure, which is divisible into shares, and he has several daughters and heirs, and so his daughters will be his next heirs, because they partake of the inheritance and are capable. For a person may have several daughters by one mother, and several by another mother, and so they are all parceners and capable of taking the paternal descending inheritance, as far as regards the paternal descending inheritance, they

participes et capaces quantum ad perquisitum fratris vel sororis, qui fuerint de eadem matre. Illæ vero, quæ fuerint de eadem matre, erunt hæredes propinquiores, participes et capaces de perquisito fratris vel sororis ꝑpter sanguinem. Et illi, qui sunt de diversa matre, masculus sive fœmina, propinqui erunt hæredes & recti, et in vita aliorum nunquam participes, nec capaces in vita talium, sed post mortem. Et regulariter verum est, quòd omnes illi propinquiores dicuntur esse hæredes, ad quos jus ꝑprietatis descendit jure hæreditario. Si autem de necessitate, per conventionem et conditionem tacitam vel expressam, vel ꝑ defectu hæredum vel ꝑpter delictum, jus proprietatis ad donatorem vel ad dominum capitalem revertatur qualitercunque, ut eschaeta, licèt hæres non sit, et in aliquo casu loco hæredis, propter terram quæ ad ipsum revertitur in dominico, seysina semper sequetur ipsum, cùm sit loco hæredis, licèt non sit hæres, & cum eo permanebit hæreditas, ut eschaeta, & extinguitur homagium, et servitium, cùm non sit hæres qui petere possit vel qui petat. Cùm autem jus ꝑprietatis sic ad donatorem reversum fuerit, licèt alius fuerit in seysina ex donatione ejus, qui donare non potuit, extinguitur omnino warrantum, ut si donator ad warrantum vocatus fuerit, warrantizare non tenetur, eò quòd jus habet petendi terram illā in dominico, quòd, si homagium ceperit vel servitium, vel cōfirmaverit, tale donū, ut suprà dictum est, tunc tenebitur ad warrantum. Et notandū quòd hæredū, quidā sunt veri hæredes, & quidā sunt quasi hæredes, in loco hæredum, & ꝑ hæredibus habentur; veri hæredes ex causa successionis, quasi hæredes, & loco hæredum, vel ꝑ hæredib⁹ ꝑ modum donationis;

will not however be partakers of nor capable as regards the acquisition of a brother or a sister, who are of the same mother. But those who are of the same mother will be the nearer heirs, partaking of and capable of taking the acquisition of a brother or a sister on account of their blood. And those, who are of a different mother, whether male or female, are near and right heirs, and during the lifetime of the others they are never parceners, nor are they capable of taking during the life of such persons, but after their death. And it is true regularly, that all these are called next heirs, to whom the right of property descends by hereditary right. But if from necessity, by a covenant and condition, tacit or express, or from failure of heirs, or on account of an offence against the law, the right of property returns to the donor or to the chief lord, in whatsoever way it may be, as an escheat, although he be not the heir, and in some cases if he be in the place of an heir, on account of the land which reverts to him in domain, seysine will always follow him, when he is in the place of an heir, although he be not the heir, and the inheritance will remain with him, as an escheat, and the homage and the service are extinguished, since there is no heir, who can claim, or who claims. But when the right of property has thus returned to the donor, although another has been in seysine in virtue of the donation of him, who could not give, the warranty is altogether extinguished, so that if the donor should be called to warrant, he is not bound to warrant, on the ground that he has the right of claiming that land in domain, but if he has received homage or service, or has confirmed such a gift, as above said he will then be bound to a warranty. And it is to be noted, that of heirs, some are true heirs, and some are as it were heirs in the place of heirs, and are accounted for heirs; true heirs, as regards the succession, and as it were heirs in the place of heirs, and accounted for heirs, as regards the mode of donation; such as

sicut sunt assignati, vel loco hæredum sicut domini capitales, quibus revertitur hæreditas ꝑꝑ defectum, vel ꝑpter delictum, sicut eschaeta ꝑꝑ defectum hæredis, cùm hæredes deficiant in linea descendente ; ꝑpter delictum, i. ꝑpter feloniam, ubi impeditur descensus, licèt hæredes extiterint aut parentes. Item ꝑꝑ modum donationis, ut si donator dicat, Do tali & hæredibus suis de corpore suo procreatis, & si hæredes tales non habuerit, vel si habuerit & defecerint, tunc do tali & hæredibus suis, quos de corpore suo habuerit, & sic in infinitum de pluribus, tales succedunt non ex causa successionis, sed hæredes erunt per modum donationis.[1]

Cap. XXXI.

1. De gradibus successionis et parentelæ.

Dictum est suprà de qualitate hæredum & differentia, & qui vocātur ad successionem, & qui aliis in successione præferuntur, sicut hæredes propinquiores. Sed quoniā hæreditas, & jus successionis descendit per gradus, ideò videndum est de gradib⁹ successionis & parentelæ, & qualiter jus descendit & ꝑ quas personas ad eum, qui in jure ꝓprietatis seysinam petierit alicuj⁹ antecessoris. Et sciendum quòd cognationum sive parentelarum aliæ sunt suprà, aliæ sunt infrà, aliæ ex transverso, sive à latere. Parentes verò, qui sunt suprà, dici poterunt antecessores & parentes, sed qui mortui sunt & hæredes antecedunt, i. cedunt ante, & hæredes cedunt eis sub, quasi succedunt. Est enim cedere quasi recedere, & est cedere alio sensu venire. Illi verò, qui sunt infra rectam lineam vel transversalem, dici poterunt rectè cognati & hæredes. Illi verò, qui sunt suprà in linea transversali, dici poterunt rectè

[1] "Et notandum" to "per modum "donationis," inclusive, is part of the original text in MSS. Rawl. and Gal.

persons assigned as such, or in the place of heirs as chief lords, to whom the inheritance reverts, on account of failure of heirs, or on account of an offence against law, as an escheat on account of failure of heirs, when heirs fail in the descending line; on account of an offence, that is, on account of felony, where the descent is impeded, although there be heirs or relatives. Likewise on account of the manner of donation, as if the donor should say, I give to such an one and to his heirs begotten of his own body, and if he have not such heirs, or if he have them and they fail, then I give to such an one and to his heirs, whom he may have of his body, and so to infinity of several, such persons succeed not on the grounds of succession, but they will be heirs through the mode of donation.

Chapter XXXI.

1. Of the degrees of succession and of relationship.

We have spoken above of the quality and difference of heirs, and who are called to the succession, and who are preferred to others in the succession, as next heirs. But since the inheritance and the right of succession descends by degrees, we must therefore see respecting grades of succession and of relationship, and in what ways right descends and by what persons to him, who has claimed the seysine of any ancestor in right of property. And it is to be known that of kinship and of relationship some steps are upwards and others are downwards, and others are transverse or sidewards. But relations upwards may be called ancestors or parents, but such as are dead and precede the heirs, that is cede before them, and the heirs cede after them, or as it were succeed them. For to "cede" is as it were to "recede," and to "cede" is in another sense to "come." But those, who are within the right line or the transverse line, may be called rightly kinsmen and heirs. But those, who are above in the transverse line, may be

parentes & hæredes, deficientibus illis qui sunt inferiùs, & alio modo, quamvis impropriè, cognati dici poterunt & hæredes, eò quòd antecessores succedunt ꝑ defectu inferiorum. Superior autem cognatio parentum, sive antecessorum qui mortui sunt, in linea recta ascendente est, & incipit à primo gradu, vz. à patre vel matre ascendente usq; ad avum à secundo gradu, s. ab avo usq; ad proavum, à tertio gradu, s. à proavo usq; ad abavum, & sic à quarto gradu, s. ab abavo usq; ad atavū, sic à quinto gradu, s. ab atavo usq; ad tritavū, qui obtinet in cōputatione sextū gradum. Ulteriùs autē non fit cōputatio ascensus, quia talis cōputatio excederet[1] memorias homiñ. Et sic resolvēdo à tritavo cōputato ꝑ patre, vel tritavia ꝑ matre, fieri poterit descēsus jure usq; ad trinepotē & trineptē. Et est inferior cognatio faciēda. Est etiā cōputatio liberorū & hæredū recta linea descendentium, à primo gradu, s. à patre vel matre usq; ad trinepotē vel trineptē, ut à patre vel matre usq; ad nepotem vel neptem, & à nepote vel nepte usq; ad ꝑnepotem, vel proneptem, &
f. 67 b. sic de gradu in gradum usq; ad trinepotem, & ulteriùs si necesse fuerit. In quo casu nullus debet vocari ad successionem in linea transversali, descendendo vel ascendendo, masculus nec fœmina, quamdiu aliquis hæres superstes superfuerit in linea recta descendente,

[1] "excluderet," MS. Rawl.

rightly called parents and heirs, upon the failure of those who are below, and in another manner, although improperly, they may be called kinsmen for that reason, because ancestors succeed on failure of those below them. But the higher kinship of parents or of ancestors, who are dead, is in the right ascending line, and begins from the first degree, that is, from the father or the mother ascending up to the grandfather; in the second degree, that is from the grandfather to the great-grandfather; in the third degree, that is from the great-grandfather to the great-great-grandfather; in the fourth degree, that is from the great-great-grandfather to the great-great-grandfather's father; in the fifth degree, that is from the great-great-grandfather's father, to the great-great-grandfather's grandfather; in the sixth degree, that is from the great-great-grandfather's grandfather, to the great-great-grandfather's great-grandfather, who occupies the sixth grade in the computation. But the computation of ascent does not go further, because such a computation would go beyond the memory of mankind. And so by turning back from the great-great-grandfather's great-grandfather as the father, and from the great-great-grandmother's great-grandmother as the mother, a descent of right may be made to the grandson and the grand-daughter in the sixth degree. And the lower kinsmanship is to be made out. There is also a computation of children and of heirs descending in the right line from the first degree, that is from the father or the mother to the grandson or grand-daughter in the sixth degree, as from the father or the mother to the grandson or the grand-daughter, and from the grandson or the grand-daughter to the grandson's child or the grand-daughter's child, and so from grade to grade down to the great-great-grandson's great-grandson, and further if it should be necessary. f. 67 b.
In which case no one ought to be called to the succession in the transverse line, descendants or ascendants, male or female, as long as any heir remains surviving in a

sed illis omnino deficientibus in parentela, de necessitate revertitur jus proprietatis ad eos, qui sunt in linea transversali descendentes. Et incipienda est computatio parentelæ in primo gradu p̄ omnes gradus & hæredes, ad quos jus proprietatis descenderit, sicut à communi stipite eorum, qui utrumq; jus habuerint, videlicet proprietatem & possessionem per omnes gradus, & personas illas, quas seysina sequi deberet, si vivi peterent, vel tempus, quòd hæredes esse potuissent, expectassent, i. si aliquid ad eos descenderit, mortuis antecessoribus. Et in quocunq; gradu in linea rectè descendente hæredes defecerint, revertitur de necessitate jus proprietatis ad eos, qui sunt in linea trāsversali, scilicet ad fratrem patris vel matris, vel sororem, & promedium,[1] quasi per plures gradus. Si autem nullus omnino pervenerit hæres à primo gradu in linea rectè descendente, & frater antenatus obierit in vita patris communis sine hærede, vel si hæredem habuerit, & in vita patris defecerit, & omnes fratres præmortui, tunc fiat computatio à primo gradu immediatè, sicut à communi stipite, à patre vel à matre existentibus in seysina, usq; ad fratrem vel sororem exeuntem in linea transversali; qui quidem, cù seysinā suā obtinuerint, faciunt stipitem & lineam rectā descēdendo, quantum ad suos hæredes. Si autem tempore descensus, filī vel filia defecerint, & hæredes habuerint recta linea descendendo, s. ad nepotes vel neptes vel ulteriùs, & quidam defecerint, & quidam non, p̄ omnes gradᵒ, & p̄ omnes p̄sonas, p̄ quas jus descendisse debuit si viverent, fiat computatio descensus & juris ad illum, qui superstes est & petit. Si autem tales aliquando extiterint, & defecerint in tali omnino linea descēdente in

[1] Per medium, MS. Rawl.

descending right line, but upon those failing altogether in relationship, the right of property reverts of necessity to those who are descendants in a transverse line. And the computation of relationship is to be commenced in the first degree through all the degrees and heirs to whom the right of property will descend, as from the common stock who have each right, namely property and possession through all the degrees, and those persons, whom seysine ought to follow, if they were alive and have claimed, or have awaited the time, when they might claim as heirs, that is, if anything descended to them on the death of their ancestors. And in whatever degree in the right descending line heirs shall fail, the right of property of necessity reverts to those, who are in the transverse line, for instance to the brother of the father or of the mother or the sister, or the intermediate person, as it were through several degrees. But if no heir at all be forthcoming from the first degree in a right descending line, and the elder-born brother has died in the lifetime of the common father without an heir, or if he has had an heir and during the lifetime of the father he has failed, and all the brothers have predeceased him, then a computation is made immediately from the first degree, as from a common stock, from the father or the mother, who is in seysine, as far as the brother and the sister going out in the transverse line ; who indeed, when they have obtained their seysine, make a stock and right line in descending as far as regards their own heirs. But if at the time of the descent, a son or a daughter has failed, and they have heirs in a right line descending, that is to nephews or to nieces or further, and indeed some have failed and some not, let a computation be made of descent and of right through all the degrees and all the persons through whom the right ought to have descended, if they were alive, to him who is surviving and claims. But if such heirs have some time existed and have failed altogether in such a descending line during

vita antecessoris, tunc quia jus de necessitate revertitur ad alios qui sunt in alia linea transversali, fiat computatio parentelæ & descensus à primo gradu & communi stipite usq; ad talem per omnes gradus & personas, ad quas jus descendit dum viverent, vel descendere debuit, si expectarent quòd hæredes essent, omissis illis omnibus, qui mortui sunt in vita antecessoris, ac si nunquam essent in rerum natura. Et si ulteriùs ad aliquē jus descenderet, fiat per omnia, ut suprà dictum est de hæredibus inferioribꝰ recta linea vel transversali venientibus. Illis autem omnino deficiētibus, ad quos jus descendit inferiùs in linea recta descendente vel trāsversali, oportebit de necessitate, quòd jus ꝑprietatis descendet ad parentes vel cognatos, qui sunt in linea transversali ascendente, sicut ad fratrem avi, & sic in linea descendente ꝑ omnes hæredes suos usq; ad illum, qui petit, & si omnes tales defecerint, tunc ad superiores, videlicet ad fratrem ꝑavi, & omnes hæredes suos, & sic de gradu in gradum, & hærede in hæredem, usq; ad illum, qui petit. Dividitur autem aliquando computatio descensus per plures lineas, & per plures gradus, ꝑpter hæredum pluralitatem qui cadunt in descensus, videlicet ubi hæreditas descendat pluribus filiabus, quarum omnes sunt cohæredes participes & capaces. Et ibi dividitur jus ꝑprie-
f. 68. tatis in ꝑsonas plures, & plura capita, & quandoq; bifariè, trifariè, quadrifariè per subdivisiones, secundùm q inferiùs in narratione juris per breve de recto manifestiùs apparebit. Et ubi quælibet ꝑsona facit sibi stipitem in primo gradu & lineam rectam descendentem, non autem ꝑ omnes personas quæ aliquando hæ-

the life of the ancestor, then because the right of necessity reverts to others, who are in another transverse line, let a computation be made of relationship and of descent from the first degree and the common stock down to the person in question, through all the degrees and persons, to whom the right descended, when they were alive, or ought to have descended, if they could have waited to become heirs, all those being omitted who died in the lifetime of the ancestor, as if they had never existed in the nature of things. And if the right should descend further to any one, let it be done in every respect as above described as regards the heirs downwards coming in a right line or in a transverse line. But if those entirely fail, to whom the right descends downwards in a right line descending, or transverse, it will be necessary that the right of property shall descend to the parents or kinsfolk who are in the ascending transverse line, as for instance to the brother of the grandfather, and so in a descending line through all his heirs as far as to him who is the claimant, and if all such fail, then to those upwards, for instance, to the brother of the great-grandfather, and to all his heirs, and so from grade to grade and from heir to heir as far as to him, who is the claimant. But the computation of descent is sometimes divided through several lines, and through several grades, on account of a plurality of heirs who fall into the descent, for instance where the inheritance descends to several daughters, of whom all are co-parceners, and capable coheirs. And there the right of property is divided amongst several persons and amongst several heads and sometimes in two ways, or in three ways, or f. 68.
in four ways by sub-divisions, according to what will appear more manifestly in the narration of the proceeding by a writ of right. And where each person makes for herself a stock in the first degree and a right line descending, the computation of descent is not to be made through all the persons, who have been at sometime heirs,

redes extiterint, licèt propinquiores, facienda est computatio descensus, nisi tantū p illas, quæ expectaverint mortem antecessorū, per quam jus pprietatis ad eas descendit, vel saltem ad hæredes de corpore suo venientes; quia, si quis plures habuerit filios & filias, & antenatus hæres ppinquior in vita patris communis sine hærede de se decesserit, postnatus statim post eum est hæres[1] propinquior, ex quo nihil juris descendit fratri antenato dum vixerit, ac si nunquam esset in rerum natura, non fiet mentio de psona sua, sed immediatè fiat computatio descensus ad fratrem postdatum, qui expectavit quòd jus ei descendit. Idem etiam erit, si frater antenatus liberos ex se habuerit, & in vita patris communis omnes decesserunt, antequam eis aliquid jus descenderit. Si autem frater antenatus, vel liberi si quos habuerit, patrem communem supvixerit, saltem per unam horam, & sic expectaverit descēsus juris ad eos, & sic statim obierint, oportet facere mentionē in descensu juris de psona ipsius ad quem jus descendit. Et eodē modo si plures sint psonæ & hæredes, ad quos jus descendit gradatim & successivè, de singulis hæredib⁹ oportebit facere mentionem in descensu; sic incipiendo à cōmuni stipite, & unde talis antecessor fuit seysit⁹ in dominico suo ut de feodo &c. Et de talibus, ut quidam dicunt,

[1] "hæres." MS. Rawl. breaks off here at the bottom of folio 35 b., and there are apparently the remains of a folio, which may have been cut away before the existing folios of the MS. were numbered. On the other hand, the next folio 36 contains a text, which is probably in continuation of the text of the missing folio. It is not found in the printed edition. It is continued over ten columns, and ends at the bottom of folio 38 of the MS. Folio 38 b. then commences at the top with the title "De heredibus "qui succedunt non ex succes-"sione, sed substitutione per mo-"dum donationis." This title is immediately followed by a text beginning "succedit quis alteri," which is identical with the printed text in paragraph 3, p. 545, below. The text of the MS. is continued precisely as in the printed text. On the upper part of folio 37 b. of MS. Rawl., at the top of the first column is a tree of consanguinity, and the contents of the ten columns are descriptive of this tree.

although nearer heirs,[1] but only through those, who have waited for the death of the ancestors, through which the right of property has descended to them or at least to the heirs coming from their bodies; because if a person has had several sons and several daughters, and the elder-born heir the nearer has died in the lifetime of the common father, without an heir of his body, the next born immediately after him becomes the next heir, from whom nothing descends to the elder-born brother during his lifetime, and as if he had not existed in the nature of things, no mention will be made of his person, but the computation of descent should be immediately made to the after-born brother, who waited until the right descended to him. The same thing will happen, if the elder-born brother has had children of his body, and they have all died in the lifetime of the common father, before any right has descended to them. But if the elder-born brother, or the children, if he has had any, have survived the common father, only for a single hour, and have so awaited the descent of the right to them, and have thereupon forthwith died, mention must be made in the descent of the right of the person, to whom the right has descended. And in the same way, if there be several persons and several heirs, to whom the right descends step by step and successively, it will be necessary to make mention of each heir in the descent; so beginning from the common stock, and whence such an ancestor was seysed in his own domain, as of a fief, &c. And from such persons, as some say, the inheritance

[1] From this point down to the end of paragraph 3 of this chapter, the text is altogether different from the text in MS. Rawl.

descendit hæreditas, & descēdere debuit tali, ut filio & hæredi, & de talibus usq; ad talem, & sic de hærede usq; ad hæredē usq; ad petentē, q quidē dici poterit, nō de eo, qui sine hærede in vita patris decesserit, vel si hæredes haberet, & omnes in vita patris decesserint, antequam aliq jus eis descenderit. Si autem frāt antenatº, relicto hærede in vita patris, decesserit, tunc fiat computatio talis descensus infrà. Et unde talis antecessor fuit seysitus, &c. Et de tali antecessore descendere debuit jus tali, ut filio & hæredi. Sed dici non debet, q aliquid jus ei descēdit, cùm non expectaret q descenderet. Et ideò sic facta mentione de eo, qui in vita patris sic obiit, dicatur, & quia talis filiº nō expectavit, ut jus ei descēderet à tali antecessore descendit jus tali, ut nepoti vel nepti, & sic deinceps, descendendo usq; ad petentē. Sed re vera sive antenatº moriatur in vita patris, vel alterius antecessoris, & sive liberos habuerit sive nō, semper debet mētio fieri de eo in quolibet descensu, ꝑpt̄ jus q ei descēderet, si mortē antecessoris expectaret.

2. De personis eorum, qui aliis succedere debent, et de ordine successionis.

Facta mētione de gradibº, bonū est videre de ꝑsonis succedentiū, & qui in successione aliis præferūtur, à primo gradu usq; ad ultimū. In primo verò gradu sedent patt̄ & mat̄, qui faciunt stipitē cōmunē. In secundo verò gradu in linea descendente sunt filiº & filia. In tertio nepos & neptis, & sic deinceps in infinitū, secundùm q prædictū est in parte, & ubi omnes ꝑpinquiores remotioribus præferuntur. Et istis omnino deficientibus, tunc in secundo gradu in linea trāsversali sunt frater patris & matris soror, et hæredes eorū

descends and ought to descend to such an one, as son and heir, and from such persons down to such an one, and so from heir to heir down to the claimant, which cannot be said of him, who has died in the lifetime of his father without an heir, or if he has had heirs and all have died in the lifetime of the father, before any right devolved to them. But if an elder-born brother has died in the lifetime of the father, having left an heir behind him, then there should be a computation of such a descent downwards. And such an ancestor was seysed, &c. And from such an ancestor the right ought to have descended to such an one, as his son and heir. But it ought not to be said, that any right descended to him, since he did not wait, that it should descend. And therefore after mention has been made of him who died in the lifetime of the father, let it be said that, because such a son did not wait for the right to devolve to him from such an ancestor, it descended to such an one, as for instance to a nephew or to a niece, and so in succession by descent down to the claimant. But in truth, whether the elder-born dies in the lifetime of the father or another ancestor and whether he has had children or not, mention ought always to be made of him in any descent, on account of the right which would descend to him, if he awaited the death of his ancestor.

2. Of the persons of those, who ought to succeed to others, and of the order of succession.

Mention having been made of the grades [of succession], it is well to consider the persons of the successors, and who in the succession are preferred to others, from the first grade to the last. In the first grade then sit the father and mother, who make the common stock. In the second grade in the descending line are the son and the daughter. In the third grade the grandson and the grand-daughter, and so in succession without end, according to what has been said in part, and where all the nearer heirs are preferred to the more remote. And when they altogether fail, then in the second degree in the transverse line are the brother of the father and the

in infinitū descendētes. Itē in linea recta ascēdente, av^{9}, ꝑav^{9}, in suis gradib^{9}, & sic ulteriùs secundùm q
f. 68 b. prædictum est, et eorum hæredes à latere ꝑvenientes in infinitum, ut supra dict' est. Item frater patris, & soror dicuntur patru^{9} & amita, & si ex amita ꝑcedat filius, vel filia, dici poterunt quanī ad nepotem ꝑprior amitiv^{9} & ꝑprior amitiva, & sic eoī filii & filiæ, nepos & neptis, & ulteriùs descendendo in infinitum. Illi verò, qui ex patruo ꝑcedunt, filius vel filia, patrueles nuncupantur, & sic deinceps eoī filius & filia in infinitum descendendo. Item in linea recta descendente vel transversali, ex parte filiæ alicujus, soror filiæ vel frater, de uno eodemque patre & diversa matre, consobrina dici poterit, & frater ex talibus consobrinus, & horum filius vel filia, nepos, neptis, & sic deinceps. Item soror filiæ vel frater de una & eadē matre, sed diverso patre, soror uterina, frater uterinus, dici poterunt, & sic eoī filius & filia, & sic deinceps ut suprà. Item soror patris dicitur amita, & soror matris dī matertera, & eoī filius & filia, & sic in infinitum. Et istis om̃b^{9} deficientibus, ad superiores fiet descensus, sicut ad fratrem avi vel aviæ, vel ad sororem in linea trāsversali, sicut ad patruum magnum, vel amitam magnam, & ad eoī hæredes, filium vel filiam, & sic deinceps. Et illis omnino deficientib^{9}, tunc ad fratrem ꝑavi ex parte patris, qui dicitur ꝑpatruus magn^{9}, vel ejus sororem, q̃ dicitur ꝑamita magna, & sic deinceps

sister of the mother, and their heirs descending without end. Likewise ascending in a right line, the grandfather, the great grandfather, in their grades, and so further according to what has been said, and their heirs f. 68 b. collaterally succeeding without end, as above said. Likewise the brother and the sister of the father are called the uncle and the aunt, and if a son or a daughter proceed from the aunt, they may be called as regards the grandson the nearer male cousin by the aunt's side, and the nearer female cousin by the aunt's side, and so their sons and their daughters, grandson and grand-daughter, and so descending without end. But those, who proceed from the uncle, whether son or daughter, are described as cousins by the uncle's side, and so their son and daughter descending without end. Likewise in a right descending or transverse line on the side of any daughter, the sister or the brother of a daughter, of one and the same father but of a different mother, may be called a female cousin, and a brother from such may be called a male cousin, and their son and daughter, grandson and grand-daughter, and so in succession. Likewise the sister or the brother of a daughter of one and the same mother, but of a different father, may be called an uterine sister and an uterine brother, and so their son and daughter in succession, and so successively as above. Likewise the sister of the father is called an aunt, and the sister of the mother an aunt by the mother's side, and their son and daughter, and so on without end. And upon all these failing, then the [succession will go] to the higher ones, as to the brother of the grandfather or of the grandmother, or to the sister in the transverse line, as to the great-uncle or to the great-aunt, and to their heirs, son or daughter, and so in succession. And upon all those failing then [the succession will go] to the brother of the great-grandfather on the father's side, who is called the great-grand-uncle, or to his sister, who is called the great-grand-aunt, and so in succession to

ad filios & filias, eoꝝ nepotes & neptes. Illis autem deficientibus, ex parte patris, tunc vocentur fratres abavi & abaviæ, qui dicuntur abpatruus magn⁹, & abavita[1] magna, & eoꝝ hæredes in infinitum. Et istis deficientibus ex parte patris, frater atavi vel ataviæ, qui dicuntur atpatruus magnus, & atavia magna & eoꝝ hæredes in infinitum. Quibus deficientibus, vocantur ex parte patris frater & soror triavi & triaviæ, qui dicuntur tripatru⁹ magn⁹, & tritavia magna, & eorum hæredes in infinitum. Et ex alia parte transversali à parte matris, ut si avunculus vel matertera, & omnes alii hæredes defecerint, tunc vocantur fratres & sorores avi vel aviæ ex parte matris, et vocantur avunculus magnus, & matertera magna, & eorum hæredes in infinitum. Et illis deficientibus, tunc vocantur ex parte matris frater proavi & proaviæ, vel soror, qui dicuntur proavunculus magnus & promatertera magna, & eorum hæredes in infinitum. Et sic gradatim vocandi sunt abavunculus magnus, & abmatertera magna, & atavunculus magnus, & atmatertera magna ex parte matris in linea transversali, triavunculus magnus & trimatertera magna ascendendo, & eorum hæredes in infinitum. Et qualiter gradus cognationis computentur, & quo gradu, quis distet ab alio in linea descendente vel ascendente, in figura superiùs[2] in arbore ante principium libri picta,[2] manifestiùs quasi ad oculum apparebit.

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[1] "abavita"—the correct reading is evidently "abavia."

[2] "superiùs." The tree itself is inserted in the text of MS. Rawl. In MS. Galeaczo, f. 31 b., it is described as "figura inferius depicta," which is also the description of the figure in the Gray's Inn MS. Godebold, fol. 35 b., and in other MSS. of the same family. The reading adopted in the text belongs to a third family of MSS. to which MS. Crewe belongs.

their sons and daughters, and to their grandsons and grand-daughters. But upon these failing on the father's side, then should be called the brothers of the great-great-grandfather, who are called the great-great-grand-uncle and the great-great-grand-aunt, and their heirs without end. And if they fail on the side of the father, the brother of the great-great-grandfather's father, or the great-great-grandfather's mother, who are called the great-great-grandfather's uncle, and the great-great-grandfather's aunt, and their heirs without end. Upon failure of whom there are called on the father's side the brother and the sister of the great-great-grandfather's grandfather, who are called the great-great-grandfather's grand-uncle and the great-great-grandfather's grand-aunt, and their heirs without end. And on the other transverse side on the side of the mother, as if the uncle or the aunt and all the other heirs have failed, then are called the brothers and the sisters of the grandfather or of the grandmother on the mother's side, and the great-uncle and the great-aunt are called, and their heirs without end. And upon their failing, then are called on the mother's side the brother of the great-grandfather or of the great-grandmother, or the sister, who are termed the great-grand-uncle and the great-grand-aunt, and their heirs without end. And so by steps are to be called the great-grand-uncle's father and the great-grand-aunt's mother, and the great-grand-uncle's grandfather, and the great-grand-aunt's grandmother on the mother's side in the transverse line, the great-grand-uncle's great-grandfather, and the great-grand-aunt's great-grandmother in the ascending grade, and their heirs without end. And how the grades of kindredship are computed, and by what grade one is distant from another in the descending or the ascending line will appear more manifestly to the eye in a drawing delineated above on a tree printed before the commencement of the book.

3. De hæredibus, qui succedunt non ex successione, sed substitutione per modum donationis.

Succedit quis alteri, vel quasi succedit, non quidem jure hæreditario ut hæres, sed propter defectum hæredis, vel delictum, sicut capitalis dominus vel feoffator in eschaetam suam, de quo superiùs fit mentio in titulo, de donationibus. Succedit etiam quis alteri, vel quasi, non quidem jure hæreditario, vel jure successionis, ut hæres, sed ex causa substitutionis, per modum donationis, de quo etiam superiùs fit mentio titulo eodem, ut si dicat donator in donatione facienda, Sciant, &c. quòd dedi tali, tantam terram & tantam cum pertinentiis, habendum & tenendum sibi & hæredibus suis f. 69. de corpore suo ꝑcreatis tantùm, & quo casu, cùm oñs hæredes remotiores excludantur, si terra reversura ad donatorem ꝑ conditionē tacitā vel expressā, si tales hæredes defecerint, sicut adjiciat donator in charta donationis; & si talis tales hæredes non habuerit, vel si habuerit, & defecerint, ꝙ terra illa revertatur ad alium fratrem suū, vel extraneum, habend & tenend sibi & hæredib⁹ suis, de corpore suo ꝑcreatis, ut p̃dictum est, & sic deinceps pluribus successivè. Si tales hæredes non habuerit primus feoffatus, ad substitutum non descendit aliquod jus, ꝑ ꝙ competat ei assisa mortis antecessoris, de seysina primi feoffati, in jure possessionis, nec breve de recto, super jure ꝑprietatis. Et unde ꝙ res magis valeat quàm pereat, & ꝙ effectū habeat donatio, q̃ de voluntate donatoris p̃cessit, si post mortē primi donatorii substitutus se justè posuerit in seysinam, & donator vel ejus hæres petierit, contra actionem suam substituto dabitur exceptio, de modo donationis. Si autē extra seysinam positus substitutus petat, non consulitur ei, nisi ꝑ breve forma-

3. Of heirs, who succeed not from succession, but from substitution by mode of donation.

One person succeeds to another, or as it were succeeds, not indeed by right of inheritance as heir, but on account of failure of heirs, or on account of a delict, as in the case of a chief lord or a feoffee entering upon an escheat, concerning which mention has been made above in treating of donations. Also one person succeeds to another, or as it were succeeds, not indeed by hereditary right, or by right of succession as heir, but by reason of substitution by the mode of the donation, concerning which mention has been made in the same title, as if the donor should say in making a donation, Let all men know, &c. that I have given to such an one so much land and so much with its appurtenances, to have and to hold to himself and his heirs begotten of his body alone, and in which case since all the more remote heirs are excluded, if the land is to revert to the donor by a tacit or express condition, if such heirs fail, according as the donor shall add in the charter of donation; and if such an one has no such heirs, or if he has had them and they should fail, that the land should revert to another of his brothers, or to a stranger, to have and to hold to himself and his heirs begotten of his own body as aforesaid, and so in succession to several persons successively. If the first feoffee has not had any such heirs, no right descends to the substitute, by which he is entitled to an assise on the death of his ancestor, from the seysine of the first feoffee, in right of possession, nor to a writ of right upon the right of property. And hence in order that the thing should operate rather than fail, and that the donation, which proceeded from the will of the donor, should have effect, if the substitute after the death of the first donee puts himself lawfully into seysine, and the donor or his heir should claim, the substitute will have in answer to his action an exception concerning the mode of donation. But if the substitute put out of seysine should claim, he has no remedy except by a writ stating formally, that a substi- f. 69.

tum de substitutione facta p̄ mod̄ donationis, quod in se modum contineat; breve autem tale erit, ut liquere poterit.

Cap. XXXII.

1. De partu supposito, et cum uxor fecerit se prægnantem, cum non sit, ad exhæreditationem veri hæredis. Britton, l. iii. ch. ii. § 13. Fleta, 13.

Dictū est suprà, q̄ p̄sumitur q̄ quis sit hæres, eò q̄ nascitur ex uxore, & q̄ sit hæres, quē nuptia demōstrāt. Et quoniā aliquādo supponitur part⁹ ab uxore, q̃ se facit p̄gnātē, cū nō sit, & aliquādo à custode, qui (mortuo vero hærede) supponit extraneū, & nutrit ut hæredē ad hæreditatē, & ad exhæredationē veri hæredis, cū non sit filius nec hæres. Ideo de partu supposito videnḋ, & qualiter hujusmodi malitia in curia regis cōvincatur. Esto igitur q̄ uxor alicuj⁹ in vita viri sui se p̄gnantē fecit, cū non sit, vel post mortē viri sui se p̄gnantē fecit, cū non sit, ad exhæredationē veri hæredis, vel fortè cum p̄gnans sit, non sit verisimile q̄ partus possit esse viri defuncti. Et in duob⁹ primis casibus, ubi se fecerit p̄gnantē, cū non sit, ad querelā veri hæredis, p̄ p̃ceptum domini regis, faciat vic. venire talem mulierem corā eo, & corā custodibus placitorum coronæ, vel etiam corā aliquo, quem dñs rex justic. constituerit, & faciat eam videri à discretis mulieribus, & tractari p̄ ubera, & p̄ ventrem, ad inquirendā veritatem, & si suspitio habeatur alicujus falsitatis, qualitèr debeat custodiri. Et de hac materia inveniri poterit in rotulo de terñ San. Hilar. & de terñ

tution was made by the mode of donation, which should contain in itself the mode; but the writ should be such, that it may be clear.

Chapter XXXII.

1. Of a suppositious birth, and when a wife has made out herself to be pregnant and is not so, to disinherit the true heir.

It has been said above, that there is a presumption that a person is the heir, who is born from a wife, and that he is the heir, whom marriage points out. And since sometimes a birth is feigned by a wife, that she makes out herself to be pregnant, when she is not so, and sometimes by a guardian, who upon the true heir dying sets up a stranger and brings him up as heir to the inheritance, and for the disinheritance of the true heir, since there is no son nor heir: therefore let us consider the case of a supposititious offspring, and in what manner malice of this kind may be convicted in the court of the king. Let it be then, that the wife of a certain person during the lifetime of her husband makes out herself to be pregnant, when she is not so, or after the death of her husband makes herself out to be pregnant, when she is not so, for the purpose of disinheriting the true heir, or perchance, if she be pregnant, it is not very probable that the offspring can be the child of her deceased husband. And in the two first cases, where she has made out herself to be pregnant, when she is not so, upon the complaint of the true heir, by a precept of the lord the king, let the viscount cause the said woman to come before him and before the keepers of the pleas of the crown, or even before any person, whom the lord the king has made a justice, and cause her to be inspected by discreet women and to be handled by them about the breasts and about the belly to discover the truth, and if there be a suspicion of any falsehood, how she ought to be kept in custody. And upon this matter information will be found in a roll of St. Hilary's term, and of

Paschæ anno reg. H. quinto in com̃ Norf., de Petro constabulario de Manton, & Muriella, quæ fuit uxor Willielmi de Maūton, & in quo casu, necesse erit inquirere ab uxore de tēpore conceptus sui, & de morte viri sui, & de accessu vel recessu suo, sub ea forma, breve erit tale.

2. Breve de videndo mulierem, ut sciatur utrum sit prægnans, vel non. Britton, l. iii. ch. ii. § 14. Fleta, 13.

Rex vic. salutem. Præcipimus tibi, quòd omni dilatione & occasione postposita, venire facias coram te & coram custodibus placitorum coronæ nostræ in pleno comitatu tuo, vel coram tali, quem ad hoc justic. nostrum constituimus, A. quæ fuit uxor B. & quæ se facit prægnantem, & coram prædictis custodibus facias eam videri per legales & discretas mulieres, per quas veritas meliùs sciri poterit, & diligenter tractari à mulieribus prædictis per ubera, & per ventrem, modis omnibus, quibus inde meliùs possit certiorari, utrum prægnans sit necne, & si prædicti custodes & mulieres viderint, quòd prægnans sit, vel inde dubitaverint, tunc illam poni facias in castro nostro tali, & ita quòd nulla domicella, quæ prægnans sit, vel alia, de qua suspitio possit haberi alicujus falsitatis faciendæ, sit cum ea, & in castro illo moram faciat, quousque de partu suo constare possit. Provideas etiam quòd in castro illo ita discretè custodiatur, ne in custodia illa de partu suo possit falsitas evenire, mandavimus enim constabulario tali, quòd in prædicto castro eam recipiat, &c. Et si alius ad hoc quàm vic. constituatur justic. ut prædictum est, tunc addatur in fine clausula ista: Quia mittimus talem, ut cum ipso & per ipsum negotium illud perducas ad effectum. Breve autem, quod dirigitur constabulario, quòd eam recipiat, tale erit.

Easter term, in the fifth year of the reign of king Henry, in the county of Norfolk, concerning Peter the constable of Manton, and Muriella who had been the wife of William of Maunton, and in which case it will be necessary to enquire from the wife concerning the time of her conception and concerning the death of her husband, and of his access to her and his quitting her, under this form; the writ will be such.

2. A writ to examine a woman, that it may be known whether she be pregnant, or not.

The king sends greeting to the sheriff. We enjoin you, that putting aside all delay, and occasion of delay, you cause to come before you and before the keepers of the pleas of our crown in your full county, or before such a person whom we appoint our justice for this purpose, A., who was the wife of B., and who gives herself out to be pregnant, and in the presence of such keepers cause her to be examined by loyal and discreet women, by whom the truth may be better ascertained, and to be carefully handled by the aforesaid women as to her breasts and her belly in all ways, by which it may be better ascertained whether she is pregnant or not; and if the aforesaid keepers and women discover that she is pregnant or have doubts thereupon, then cause her to be put in such a castle of ours, and so that no damsel, who may be pregnant, or any other whom there can be suspicion of practising any falsehood, be in her company, and let her remain in that castle, until it can be settled respecting her having offspring. Take care also that in that castle she be so discreetly guarded, so that during her custody no falsehood can be practised respecting her offspring, for we have commanded such a constable to receive her in the aforesaid castle, &c. And if a justice other than the sheriff be appointed to do this, as has been said above, then let there be added at the end this clause: Because we send such a person, that with him and through him you may give effect to this business. But the writ, which is directed to the constable to receive her, shall be in this form:

3. Breve constabulario, quod recipiat eam in castro suo.

Rex tali constabulario salutem. Præcipimus tibi, quòd talem mulierem, quæ se facit prægnātem, in tali castro (cùm pervenerit ad te) recipias, & ita quòd in eodem castro moram faciet[1] ad custum suum proprium, & si duæ mulieres vel tres de progenie tali voluerint visum de ea facere singulis diebus, semel in die in prædicto castro, hoc eis permittas. Teste, &c. Et hoc ita fiat, si uxor fecerit se prægnantem in vita viri sui; si autem post mortem viri sui prægnantem fecerit, cùm non sit, ad exhæredationem veri hæredis, & petat se mitti in possessionem bonorum nomine ventris, ad malitiam convincendam fiat tale breve ad querimoniam hæredis.

4. Item, quod ad querelam hæredis videatur.

Rex vic. salutem. Monstravit nobis A. frater B. quòd cùm talis fœmina, quæ fuit uxor prædicti B. prægnans non sit, ipsa falsò dicit se esse prægnantē de prædicto B. & ad exhæredationem ipsius A. de terra, quæ fuit prædicti B. quæ ad ipsum A. jure hæreditario descendere debuit ut dicit, tanquam ad fratrem & hæredem ipsius B. si prædicta talis de eo prolem nō habuerit. Et quoniā tantam excogitatam malitiam volumus impedire, tibi præcipimus, quòd assumptis tecum discretis & legalibus militibus & discretis & legalibus mulieribus de comitatu tuo, in propria persona tua accedas ad ipsam talem mulierem, & coram prædictis militibus facias eam videri à prædictis mulieribus, & diligenter tractari per ubera, & per ventrem, modis omnibus, quibus meliùs & honestiùs inde poterit certiorari. Et si ipsam invenerint p̃gnantem vel impg̃nantē, diligenter inquirant de tēpore conceptus quoquo modo, quando & ubi, & quando illa crediderit se esse paritūrā. Et inquisitionē q̃ inde feceris, scire facias

[1] "faciat," MS. Rawl.

3. The writ to the constable, that he should receive her into his castle.

The king sends greeting to such a constable. We enjoin you to receive into such a castle such a woman, who gives herself out to be pregnant, when she shall have come to you, and so that she may stay in the same castle at her own cost, and if two or three women wish to examine her every day concerning such progeny, you may permit them to do it once a day in the said castle. Witness, &c. And this should be so done, if the wife gives herself out to be pregnant during the lifetime of her husband; but if after the death of her husband she gives herself out to be pregnant, when she is not so, for the purpose of disinheriting the true heir, and claims to be put into possession of the goods in the name of her belly, such a writ should issue at the complaint of the heir to convict her of malice.

4. Likewise, that upon the complaint of the heir she be inspected.

The king sends greeting to the sheriff. A., the brother of B., has represented to us that such a woman, who was the wife of the aforesaid B., is not pregnant, whilst she falsely says that she is pregnant by the aforesaid B., to the disinheritance of A. himself, as regards the land which belonged to B. aforesaid, which ought to descend to A. by hereditary right, as he says, as being the brother and the heir of B. himself, if the aforesaid [woman] had no offspring by him. And since we wish to defeat such contrived malice, we enjoin you, that having associated to yourself discreet and loyal knights and discreet and loyal women of your county, you visit in your own person the said woman, and in the presence of the said knights you cause her to be examined by the said women and carefully handled about the breasts and the belly in every way, by which it may be better and honestly ascertained. And, if you find her pregnant or impregnated, you will diligently enquire as to the time of her conception in every possible manner, when and where, and when she believes that she will bring forth. And make known the inquisition, which you shall thereupon make to our justices, on such a day

justic. nostris tali die apud Westm̃ evidentèr & distinctè, & apertè, p literas tuas sigillatas, & per discretos milites ex illis, qui inquisitioni illi interfuerunt, f. 70. & cognita veritate, fiat inde, q justè fuerit faciend', & interim prædicta talis salvo custodiatur in castro tali, vel alibi tuto loco, ad omnem suspitionē tollendam alicujus falsitatis faciendæ, donec de partu ipsius constiterit. Et habeas ibi hoc breve, & nomina militum & mulierum, per quoꝝ sacramētum inquisitionem illam feceris. Teste, &c. Si autem talis mulier venire debet corā justic. apud West. tunc fiat breve in hac forma, q vic. habeat corp^{9} ejus.

5. Item, quod vicecomes faciat eam venire coram justiciariis apud Westmonasterium.

Rex vic. salutem, p̃cipimus tibi, q, oñi occasione postposita, habeas coram justic. nr̃is apud W. tali die, corpus A. quæ fuit uxor B. q̃ se dicit esse p̃gnantem, cùm non sit, ad respondend' C. quare se facit falsò p̃gnantem cū non sit, ad exhæredationem ipsius C. T. &c. Cùm autem mulier sic fuerit cautè custodita, & omni suspitione per talem custodiam sublata, si fortè p̃gnans extiterit, & peperit, de facili perpendi poterit utrum partus ille fuerit viri sui defuncti verè vel præsumptivè, vel alterius; computato tempore, scilicet à tempore quo dicebat se concepisse, & etiam à morte viri usque ad diem pariendi. Dicunt enim quidam, licèt alii sunt in contraria opinione, quòd mulier tempus pariendi etiam (p unum diem) excedere non potest, nisi fortè partus in utero mortuus sit, vel ad monstrum declinaverit cū discrimine matris. Anticipare tamen potest tempus pariendi, ut pareat præmaturè, & si monstrosum vel prodigiosum enixa fuerit, partus ille inter liberos non computabitur, vel com-

at Westminster evidently and distinctly and openly by your sealed letters and by discreet knights of the number of those, who took part in that inquisition, and upon the truth being known, let that be done which ought to be justly done, and meanwhile let the aforesaid woman be safely kept in the said castle, or in some other safe place, to remove all suspicion of any false practice, until it shall be established as to her parturition.. And have there this writ and the names of the knights and of the women, by whose oath you will have made this inquisition. Witness, &c. But if the said woman ought to come before our justices at Westminster, then let there be a writ in this form that the sheriff produce her body. f. 70.

5. Likewise that the sheriff cause her to appear before the justices at Westminster.

The king sends greeting to the sheriff. We enjoin you that, putting aside all occasion [of delay], you produce before our justices at Westminster on such a day the body of A., who was the wife of B., who says she is pregnant, when she is not so, to answer to C., why she falsely gives herself out to be pregnant, when she is not so, for the disinheritance of C. T. himself, &c. And when the woman has been thus cautiously kept in custody, and all suspicion having been removed by such custody, if by chance she has turned out to be pregnant, and has brought forth a child, it will be easily determined whether that offspring was the child of the deceased, in fact or presumptively, or of another person, the time being computed, that is from the time when she said she was pregnant, and even from the death of her husband till the day of parturition. For some say, although others are of a contrary opinion, that a woman cannot exceed her time of parturition by even a single day, unless by chance the offspring has died in the womb, or has turned into a monster with danger to the mother. But she may anticipate the time of parturition so as to bring forth prematurely, and if she has brought forth any thing monstrous or prodigious, that offspring shall not be computed nor taken into account

munerabitur,[1] quantum ad successionem. Partus autem, qui membrorum officia ampliaverit, ut si sex digitos habeat in una manu, vel diminuit, ut si non nisi quatuor tantùm, tamen quia aliqualiter videtur effectus esse ut homo, inter liberos communerabitur[1] quoad successionem. Et notandum, secundùm quod superiùs dict' est, q, si cohabitaverint vir & uxor, nec sit impedimentum ex aliqua parte quin generare possent, & uxor de alio, quā de viro, conceperit, partus legittimus erit, sive ipsum vir advocaverit, sive deadvocaverit; & legittimus erit ꝑpter p̃sumptionem, eò quòd nascitur ex uxore. Talis enim præsumptio non admittit ꝓbationem in contrarium. Si autem simul habitaverint vir & uxor, & vir ꝑpter aliquod impedimentum legittimum, q probari possit, generare non possit, si uxor de alio conceperit, ꝑpter cohabitationem p̃sumitur, quòd partus sit legittimus, eò quòd nascitur ex uxore, & standum erit tali præsumptioni, donec probetur in contrarium, & sic in istis duobus casibus, præsumptio præfertur veritati. Et si pater partum semel advocaverit, iterum illum deadvocare non poterit, si hoc probetur. Si autem, cùm generare non possit propter legittimum impedimentum, partum in utero vel editum deadvocaverit, & ut decet, à domo sua amoverit, nihilominùs tamen standum erit præsumptioni, quòd partus legittimus sit, eò quòd nascitur ex uxore, admittitur tamen probatio in contrarium, si certis indiciis doceatur, quòd legittimum extiterit impedimentum, & sic vincit talem præsumptionem veritas & probatio vera. Et licèt per talem probationem, partus fuerit advocatus à patre, partus nunquam efficietur legitti-

Britton, l. iii. ch. ii. § 17. Fleta, 13.

[1] connumerabitur, MS. Rawl.

as regards the succession. But an offspring, which has amplified the duties of the members, as for instance if it has six fingers on one hand, or has diminished them, as if it has only four, nevertheless insomuch as it seems in a certain sense to have been made as it were a man, shall be counted amongst children as regards the succession. And it is to be noted according to what has been said above, that if a man and wife have cohabited, and there is no impediment on either side to prevent them procreating, and the wife has conceived from another person than her husband, the offspring will be legitimate whether the husband has avowed or disavowed the offspring; and it will be legitimate on account of the presumption, because it has been born of his wife. For such a presumption does not allow of proof to the contrary. But if the man and his wife have dwelt together, and the man by reason of some legitimate impediment, which can be proved, cannot beget a child, if the wife has conceived of another, on account of the cohabitation it is presumed that the offspring is legitimate, from the circumstance that it is born of the wife, and we must abide by such a presumption until it has been proved to the contrary, and so in both the above cases the presumption is preferred to the truth. And if the father has once avowed the offspring, he cannot a second time disavow it, if it is proved. But if, when he could not procreate on account of a lawful impediment, he has disavowed the offspring in the womb or when brought forth, and as is becoming, has removed it from his house, nevertheless we must abide by the presumption, that the offspring is legitimate for that reason, because it is born of his wife; the proof however to the contrary is admitted, if it can be shown by certain proofs, that there has been a legitimate impediment; and so the truth and a true proof overcomes such a presumption. And although through such proof the offspring has been avowed by the father, the offspring will never

mus, cùm hoc esset in præjudicium veri hæredis. Si autem, cùm diu simul non cohabitaverint p̃ biennium vel ultrà; sive vir generare possit sive non, & uxor concipere vel non, si uxor ab alio conciperet, vel partum supposuerit, ita quòd vehementer præsumi possit propter temp̃oris intervallum & distantiam locor̃, quòd vir talem partum non genuerit, sive talem partum advocaverit sive non, nunquam efficietur partus legittimus. Et licèt præsumatur quòd legittimus sit, eo quòd nascitur ex uxore, tamen non erit standum tali præsumptioni, nec erit necesse probare contrarium, cùm ipsa veritas, si de ea constiterit, q̃ simul non cohabitaverunt, doceat contrarium.

f. 70 b. Bracton, l. iii. ch. ii. § 16. Fleta, 13.

6. De præsumptione, quod nascitur ex uxore.

Dictum est suprà de uxore, quæ falsò se facit prægnantem in vita viri sui vel post mortem, cum non esset, nunc autem dicendum est, si vir vel uxor nutrierit aliquem, ut filium & hæredem, qui nec est filius nec hæres, ad exhæredationem veri heredis, sive partus sit suppositus, sive ab alio conceptus, & ad querelam veri hæredis summoneantur, quòd sint coram justic., per tale breve.

7. Breve de eo, quod nutriverat aliquem in domo ut filium et hæredem, qui nec est filius, nec hæres.

Rex vic. salutem. Præcipimus tibi, quòd habeas coram justic. nostris, &c. corpus A. & B. uxoris suæ, vel corpus alterius ipsorum, ad respondendum C. filio vel nepoti vel alteri hæredi ipsius A. qui se gerit pro hærede ipsius A. quare nutriri faciunt D. sicut filium & hæredem ipsius A. ad exheredationem ipsius C. qui nec est filius, nec hæres ipsius A., nec esse potest, ut idem C. dicit. Et habeas ibi hoc breve. Teste, &c. Et in quo casu, cùm comparuerit pater vel mater, vel

be made legitimate, since this would be to the prejudice of the true heir. But if they have not cohabited together for two years or more, whether the man can beget a child or not, and the wife can conceive or not, if the wife has f. 70 b.
conceived |from another or has substituted a child, so that it may be strongly presumed on account of the interval of time or the distance of place, that the man has not begotten such offspring, whether he has avowed the offspring or not, he will never be rendered a legitimate heir. And although it may be presumed that he is legitima te from the fact that he is born of the wife, we are not to stand by such a presumption, nor will it be necessary to prove the contrary, when the truth itself, if it can be established, that they have not cohabited together, teaches the contrary.

6. Of the presumption, that he is born of the wife.

We have treated above concerning the wife, who has falsely made herself out to be pregnant during the life-time of her husband or after his death, when she was not so, now we must treat [the case], if a husband or a wife has brought up any one as a son and heir, who is neither a son nor an heir, to the disinheritance of the true heir, whether he be a supposititious child, or conceived by another, and he be summoned at the complaint of the true heir, that they should appear before the justices by a writ of this kind:

7. A writ on the matter, that he has brought up some one in his house as a son and heir, who is neither a son nor an heir.

The king sends greeting to the sheriff. We enjoin you, that you have before our justices, &c. the body of A. and of B. his wife, or the body of one or other of them, to answer to C., the son or the grandson, or an other heir of A. himself, who represents himself to be the heir of A. himself, why they have caused D. to be brought up as the son and the heir of A. himself, to the disinheritance of C. himself, when he is neither the son nor the heir of A. himself, nor can be as the same C. affirms. And have with you there this writ. Witness, &c. And in which case, when the father and the mo-

Britton, l. iii. ch. ii. § 17. Fleta, 13.

eorum alter, & talem nutritum produxerint, tunc si talem nutritum in judicio ad filium & hæredem recognoverint, & præsumptio sit pro eis, quæ non admittit probationem in contrarium, ut si nascatur de uxore, quæ concipere potest, licèt ab alio quàm à viro suo concipiatur, vel si fortè supponatur, cùm simul cohabitaverint, nec sit impedimentum ex parte viri quin generare possit, nec est impedimentum ex parte matris quin concipere possit propter sterilitatem & senectutem, talis filius & partus erit legittimus. Si autem verus hæres docere possit contrarium, aliud erit, licèt parentes aliud in jure confessi sunt, dum tamen hoc probetur. Debet enim confessio facta in jure naturæ & veritati convenire. Pendente tali placito, antequam de tali partu constiterit, moritur partus & substituitur ei alius, & nutritur ut hæres, ad querimoniam igitur veri hæredis fiat tale breve.

8. Item cum verus hæres moriatur infra ætatem, supponit custos alium extraneum, vel si habeatur suspitio, quod mortuus sit, breve quod videatur.

Rex vicecom̃ salutem. Ostendit nobis & consilio nostro A. frater B. qui se facit hæredem ipsius B. si C. uxor B. & filius ipsius B. sine hærede de corpore suo decesserit, quòd cùm placitum sit in curia nostra, &c. inter ipsum B. & prædictam C. uxorem ejus ex una parte & eundem A. ex altera, & ipsi B. & C. in eodem placito fecerint attorn̄, & ad clamorem ipsius C. & multarum gentium, habita aliquando suspitione quòd eadem C. mortua sit, & dictum sit multotiens attornato ipsius C. quòd ad suspitionem talem tollendam ipsam producerent coram justic. & vivam exhiberēt, ipsi eam nullatenùs produxerint, propter quod major jam suborta est suspitio quàm solebat, quòd mortua sit, & mors ejus concelata ad exhæredationem ipsius A.

ther, or one of the two, have appeared and produced such child brought up by them, then if they have recognised such child brought up by them in the court as their son and heir, and there is a presumption in their favour, which does not allow of proof to the contrary, as for instance, if he be born of the wife, who is capable of conceiving, although he may have been conceived of another man than the husband, or if by chance he has been substituted, when they have once cohabited, and there is no impediment on the part of the man against his begetting a child, nor any impediment on the part of the mother against her conceiving on the ground of sterility and old age, such a son and offspring will be legitimate. But if the true heir can prove the contrary, it will be different, although the parents have declared the contrary in court, provided however, that the fact can be proved. For a declaration made in court ought to agree with nature and with truth. Pending such a plea, before the result is settled respecting such offspring, if the offspring dies and another is substituted in its place, and is brought up as the heir, at the complaint of the true heir let such a writ issue.

8. Likewise when the true heir dies under age and the guardian substitutes another who is a stranger, or if there be a suspicion that he is dead, a writ that he may be seen.

The king sends greeting to the sheriff. A. the brother of B., who makes himself out to be the heir of B., if C. the wife of B. and the son of B. himself should die without an heir of his body, has represented to us and to our council, that since there is a plea in our court, &c. between B. himself and the aforesaid C. his wife on the one part, and the said A. on the other part, and B. and C. have appointed an attorney in the same plea, and at the complaint of C. herself and many persons, there being at one time a suspicion that C. herself was dead; and it has been often said to the attorney of C. that to remove such suspicion they ought to produce her before the justices and exhibit her alive, they have [however] never produced her, for which reason a greater suspicion than usual has arisen, that she is dead and her death is

Et ideò ne falsitas veritati præferatur, tibi præcipim⁹, q assumptis tecū quatuor militibus de comitatu tuo, quos ad hoc legales esse videris in propria persona tua, f. 71. simul cum predicto A. accedas ad talem locum, ubi prædicta C. moram facit, sicut attornati sui in curia nostra nuper recognoverunt, & eā à p̃dictis militib⁹, simul cū p̃dicto A. & aliis, quos idē A. de familia sua secum adducet, & videri facias si adhuc supstes sit & viva, & si viva sit, tunc in quo statu eā inveneris, & secundꝺ q eā inveneris, certos reddas nos & justic. nostros tali loco, tali die evidēter, distinctè, & apertè p literas tuas sigillatas sigillo tuo, & sigillis quatuor p̃dictoꝝ miliꝝ, & habeas ibi nomina militum & hoc breve. Teste, &c. Itē cū legittimus hæres fuerit in custodia alicujus dñi capitalis, & mortu⁹ sit, & ille capitalis dñs alium extraneū supposuerit loco talis, tunc ad querimoniā veri hæredis vel alterius fortè, ad quē ptinet hæreditas, ut eschaeta, ut si verus hæres, qui mortu⁹ est, teneret de dño rege in capite vel de alio, & tunc fiat tale breve in psona regis.

9. Breve, si hæreditas hæredis mortui debeat esse eschaeta domini regis.

Rex vicecom̃ salutē. Præcipe A. & B. uxori ej⁹, q juste, &c. reddāt nobis tantā terrā cum p̃tinentiis, &c. in tali villa, q clamam⁹ ut eschaetā nostrā, & q̃ ad nos reverti debet ut eschaeta nostra, eò q C. filia & hæres B., qui de nobis tenuit in capite, obiit sine hærede, & in q p̃dicti A. & B. non habēt ingressū, nisi per hoc, q p̃dictus A. duxit p̃dictā B. in uxorē, postquā falsò & ad exhæredationē nostrā supposuit p̃dictā B. loco p̃dictæ C. q̃ mortua est, & fecit eam nominari C. &

concealed for the disinheritance of A. himself. And accordingly, in order that falsehood should not prevail against truth, we enjoin you that, having associated to yourself four knights of your county, whom you should see in your own person to be loyal, you together with the said A. shall proceed to such a place, where the aforesaid C. is commorant, as her attorneys in our court have lately acknowledged, and cause her to be seen by f. 71. the aforesaid knights, together with the aforesaid A. and others of her own family, whom the said A. shall bring with him, if she be still surviving and alive, and if she be alive, then in what state you have found her, and in what condition, you are to certify to us and our justices at such a place, on such a day, evidently, distinctly, and openly, by your letters sealed with your seal, and with the seals of the four knights aforesaid, and have there the names of the knights and this writ: Witness, &c. Likewise when the legitimate heir has been in the custody of some chief lord, and has died, and that chief lord has substituted another stranger in the place of such an one, then upon the complaint of the true heir or another perhaps, to whom the inheritance belongs as an escheat, as for instance, if the true heir, who is dead, held of the lord the king in chief or of another, then let there be such a writ in the person of the king.

9. A writ, if the inheritance of the dead heir ought to be an escheat of our lord the king.

The king to the sheriff sends greeting. Enjoin A. and B. his wife that they lawfully, &c. give up to us so much land with the appurtenances and in such a vill, which we claim as our escheat, and which ought to revert to us as our escheat, on the ground that C. the daughter and heir of B., who held of us in chief, has died without an heir, and into which the aforesaid A. and B. have no right of entry, except on the ground that the aforesaid A. has married the aforesaid B., after falsely and to our disinheritance he had substituted the aforesaid B. in the place of the aforesaid C. who is dead, and caused her to be called C., and to be brought up as if

nutriri, ac si esset filia & hæres p̃dicti B. q̃ nec est filia nec hæres ejus, sed filia talis ut dicitur, & nisi fecerit, &c. Et quid si p̃dicta B. supposita priùs homagium fecerit dño regi vel alteri, cujus eschaeta terra esset? quæritur an obstare debeat homagiū, & est veř quòd non, ꝑpter errorē ꝑsonæ, cepit enim homagiū talis ꝑsonæ, sicut filiæ & hæredis talis, q̃ nec fuit filia nec hæres. Itē de tenemēto, q de eo tenere debuit, cepit homag', sed nullū tenemenť de eo tenere debuit, cū non esset filia nec hæres B. & ideò homagiū nullū ꝑpter errorē, quia, qui errat, non cōsentit. Cùm autē mulier, q̃ se facit p̃gnantē, in judicio cōvicta sit, vel cōfessa q p̃gnans nō sit, tunc habeat verus hæres tale breve capitali dño directū, de capiendo homagiū suū.

10. Cum talis mulier in judicio convicta fuerit vel confessa, quod prægnans non sit, breve de faciendo seysinam vero hæredi.

Rex tali capitali dño salutē. Sciatis q A. q̃ fuit uxor B. dedit nobis & cōsilio nostro intelligi, q p̃gnans fuit de p̃dicto B. viro suo, & quoniā hoc dicebat ad exhæredationē C. fratris & hæredis ipsius B. si p̃dicta A. ꝑlē ab ipsa B. non haberet, ut idē C. dicebat, nos ad querimoniā ipsi⁹ C. fecim⁹ eam teneri sub custodia, quousq; sciri possit, secund debiť naturæ, utrum p̃gnans esset, necne. Et post multas inquisitiones, tandē didicim⁹ p confessionē ipsi⁹ A. publicè factā, in judicio corā justic. &c. & ꝑ legales & discretos homines & mulieres à quib⁹ visa fuit p p̃ceptū nostř, q non fuit p̃gnans, sed q decepta fuit, credens se esse inp̃gnatā, cū non esset. Et ideò vobis mandamus, q ꝑpter illam

she was a daughter and heir of the aforesaid B., who is not the daughter nor the heir of him, but the daughter of so and so, as it is said, and, unless he does so, &c. And what, if the supposititious B. has done homage beforehand to the lord the king or to another, whose escheat the land should be? It is asked, whether the homage ought to stand in the way. And it is true, that it should not, on account of an error of the person, for he has received the homage of such a person as the daughter and heir of such an one, when she was neither the daughter nor the heir. Likewise he has received the homage for a tenement which she was entitled to hold of him, but she was not entitled to hold any tenement of him, since she is not the daughter and heir of B., and therefore there has been no homage on account of the error, because he, who makes an error, is not consenting. But when the woman, who has made herself out to be pregnant, has been convicted in court, or has confessed that she is not pregnant, then let the true heir have such a writ addressed to the chief lord to receive his homage.

10. When such a woman has been convicted in court or has confessed that she is not pregnant, a writ to give seysine to the true heir.

The king sends greeting to such a chief lord. Know ye that A., who was the wife of B., has caused it to be understood by us and our council that she was pregnant by the aforesaid B. her husband, and since she did this for the disinheritance of C. the brother and heir of B., if the aforesaid A. had no offspring by B., as the said C. said, we at the complaint of C. have caused her to be kept in custody, until it could be known, according to the due course of nature, whether she was pregnant or not. And after many inquests we have at length heard by the confession of A. herself publicly made in court before our justices, &c., and through loyal and discreet men and women, by whom she has been inspected in virtue of our order, that she has not been pregnant, but that she was deceived, believing herself to be impregnated, when she was not. And accordingly we command you

deceptionē non omittatis, quin capiatis homagiū p̃dicti C. qui in curia nostra p̤nuntiatur hæres p̃dicti B. legittimus, & secund' regni nostri consuetudinem, seysinā de hæreditate sua, quam de nobis tenere debet ei sinè dilatione habere facias. Teste, &c.

Cap. XXXIII.

f. 71 b. 1. De hæredibus instituendis.

Mortuo tenente alicuj^{9}, primò debet dñs capitalis seysire in manū suā feoď suū & teñtum, q̤ de eo īmediatè tenetur, & tenere in manu sua, donec ei constiterit, si defunct^{9} hæredē habuerit vel nō, & hoc dico, si vacuā invenerit possessionē. Si autē hæres apparēs sit tūc, aut un^{9} vel plures, qui sūt quasi un^{9} hæres, vel cōtendūt se esse hæredes cū nō sint, & nescitur quis eoř sit p̤pinquior, in quo casu licitum erit dño capitali tenere feodum suum in manu sua, quousq̤ discussum erit inter cohæredes, quis eoř sit hæres rectus & p̤pinquior. Si autem in seysina invenerit aliquem, qui se facit hæredem, talem ejicere non possit, quin faciat disseysinam. Tenere tamen se poterit in seysina cum tali, donec talis, si hæres fuerit, ipsum recognoscat ad dñm, secundùm q̤ inferiùs dicetur in assisa mortis antecessoris in principio. Cùm autem sit hæres apparens, un^{9} vel plures unum jus habentes, ut p̃dict' est, & sint plenæ ætatis, sive inveniantur in castro sive non, inprimis capiat eoř homagium, & rationabile relevium, & postea habeant seysinam hæreditatis. Et qualiter hoc fieri debet, inferiùs dicetur pleniùs. Si autem hæres vel hæredes plures, fuerint infra ætatem, qui recogniti fuerint ad hæredes, non priùs habeat dominus capitalis custodiam hæredum &

Britton, l. iii. ch. vi. § 1. Fleta, 277.

that you do not omit, on account of that deception, to receive the homage of the aforesaid C., who is pronounced in our court to be the legitimate heir of the aforesaid B., and according to the custom of our realm you cause him to have without delay seysine of his inheritance, which he ought to hold from us to himself. Witness, &c.

Chapter XXXIII.

f. 71 b. 1. Of the appointment of heirs.

Upon the death of the tenant of any person, the chief lord ought first of all to seyse into his hand his fief and the tenement which is held immediately of him, and to keep them in his hand, until it is established to his satisfaction if the heir had or had not an heir; and this I say, if he has found the possession vacant. But if there be an heir apparent then, either one or several, who are as it were one heir, or if they contend that they are heirs when they are not, and it is unknown which of them is the next heir, in which case let it be allowable for the chief lord to hold the fief in his own hand, until it has been settled between the coheirs, who is the right and next heir. But if he has found any one in seysine who makes himself out to be heir, he cannot eject him without making a disseysine. But he may keep himself in seysine with such person, until such person, if he be the heir, recognises him as the lord, according to what will be explained below in the assise on the death of an ancestor, at the beginning. But when there is an heir apparent, either one or several having one right as aforesaid, and they are of full age, whether they are found in the castle or not, let him first take their homage and a reasonable relief, and afterwards let them have seysine of the inheritance. And in what way this ought to be done will be explained more fully below. But if the heir or the several heirs be below age, who have been recognised as heirs, the chief lord ought not to have the custody and the maritage of the heirs,

maritagium, antequam ceperit eorum homagium, & capto homagio, tunc remaneant in custodia dominorum, sicut de feodo militari, usq; ad legittimam ætatem suam. Et de custodia & maritagio inferiùs dicetur pleniùs, post tractatum de capiendo homagio & relevio.

2. Si fieri debet partitio inter hæredes.

Cùm autem plures sint hæredes unū jus habentes, & dividi debeat hæreditas inter eos ratione rei, vel ratione ꝑsonaꝝ; tunc statim post homagium captum fiat divisio hæreditatis & partitio inter cohæredes. In partitione hujusmodi facienda, nullum debet esse placitum inter cohæredes, qui ad hæredes recognoscuntur, licèt inter eos sit contentio de partibus suis, quòd aliquis eorum plꝰ habuerit ad partem suā, quā ad ipsum pertineat habendᵭ, quia nihil aliud sequitur, nisi qd' facta extensione, quilibet habeat partem suam rationabilem. Sed si, antequam contentio terminetur, ille, qui plus habuerit, seysitus moriatur, hæres suus, sive sit major sive minor, sine brevi non respondebit, ꝑpter seysinā antecessoris sui justam vel injustam. Cùm autem plures sint hæredes, ut p̄dict' est, & inter eos convenire non possit de partitione facienda, tunc fiat breve, q̄ nullū placit̄ contineat, sed q̄ conveniant ad partitionem faciendā, si sibi viderint expedire. Sed quoniam partitio fieri non potest inter cohæredes, nisi facta extē̄tione & ap̄ciatione, & extentio & ap̄ciatio fieri non possit sine militibꝰ, qui faciant extentionē cū vicecom̄, & qui aliquādo dicuntur justic. cū cōstituātur à rege, aliquādo eliguntur à partibꝰ de consensu cōmuni, ideò videndᵭ inprimis, qualiter à rege cōstituuntur, & ꝑ q̄ breve. Breve tale est.

Britton, l. iii. ch. vii. § 3.

Fleta, 310.

f. 72.

3. De justiariis con-

Rex dilectis & fidelibꝰ suis A. B. C. & D. salutem. Sciatis q̄ constituimꝰ vos justitiarios, ut coram vobis

before he has received their homage, and upon their homage being received then let them remain in the custody of the lord, as in the case of a military fief, until they come to lawful age.

2. If there ought to be a partition amongst the heirs.

But when there are several heirs having one right, and the inheritance ought to be divided amongst them by reason of the thing or by reason of the persons, then immediately after the homage let there be a division of the inheritance and a partition amongst the co-heirs. But in making this partition there ought to be no plea between the coheirs, who are recognised as heirs, although there may be contention amongst them respecting their shares, namely, that some one of them has had more for his share, than appertained to him to have, because nothing else follows, except that upon an extension having been made, each shall have his reasonable share. But if before the contention is terminated, he who has had more [than his share] should die seysed of it, his heir, whether he be of full age or a minor, shall not answer without a writ, on account of the seysine of his ancestor, whether just or unjust. But when there are several heirs, as aforesaid, and they cannot agree about making a partition, then let there be a writ, which shall contain no plea, but that they shall agree to make a partition, if they think it expedient for themselves. But since a partition cannot be made amongst co-heirs except upon an extent and a valuation, and an extent and a valuation cannot be made without knights, who must make the extent with the sheriff, and who are sometimes called justices, when they are appointed by the king, and are sometimes chosen by the parties by common consent, let us see first how they are appointed by the king, and by what kind of writ. The writ is of this kind. f. 72.

3. Of appointing justices

The king sends greeting to his beloved and faithful A., B., C., & D. Know ye that we have appointed you

stituendis ad partitionem faciendam.

oñb⁹, vel aliquo ex vobis, si oñs interesse non possitis, fiat extentio p talē & talem de talibus honorib⁹, secund̄ q̄ p̃dictis talibus & sociis suis p̄ literas nostras patentes significavim⁹. Et ideò vobis mandam⁹, q̄ tali die conveniatis apud talem locum, & p̄ sacramentum p̃dictoř talium, vel quorundam ex illis, si oñs electi p̄ cōmunem assensum partium non intersint, legaliter, discretè & rationabiliter extendatis, & ap̄ciari faciatis oñs terras & oña teñta de p̃dictis honoribus de N. cùm oñb⁹ p̄tiñ suis, sc. in dominicis, villenagiis, & servitiis liberoř hominum, in pratis, pasturis, boscis, & planis, in oñb⁹ aliis rebus ad terras illas & teñta p̄tinentibus. Et si fortè oñs extensores electi ad diē illum non venerint, vel cū venerint extentionē illā facere noluerint, tunc alios legales & discretos hoñs loco eoř ponatis, quos ad hoc inveneritis magis utiles, & p̄ eoř sacramēta extentionē illā & ap̄ciationem fieri faciatis, secund̄ q̄ p̃dict' est, ita q̄ extentio illa ultra diem illum nullo modo differatis. Et sciatis, q̄ p̃dict⁹ talis & talis manuceperunt habendi suos extensores, sc. à partibus electos & superiùs nominatos, ad eundem diem. Et extentionem illā & appreciationem evidentèr, distinctè & apertè scire faciatis nobis, vel justitiariis nostris talib⁹ tali loco, tali die, sub sigillis p̃dictoř extēsoř. In cujus rei testimoniū, &c. T. &c. Item alia forma de eodē, & si illi de coñ illo sint rebelles qualiter alii, loco eoř assumendi sunt de alio coñ, ad faciēdā extentionē.

4. De justitiariis constituendis,

Rex dilectis & fidelibus suis talibus salutem. Sciatis, q̄ constituimus vos justic. nostros, ut intersitis extensioni & ap̄ciationi faciendæ inter tales & tales, de

justices, that in the presence of you all or of some one of you, if all of you cannot be present, there may be an extent made by so-and-so, concerning such honours, according to what we have signified by our letters patent to so-and-so and their associates, and accordingly we command you, that on such a day you should meet at such a place, and by the oath of such persons aforesaid, or of some of them, if all those elected by the common assent of the parties should not be present, you should legally, discreetly, and reasonably extend, and cause to be appraised all the lands and all the tenements of the aforesaid honours of N., with all their appurtenances, for instance, in domains, in villenages, and in the services of free men, in meadows, pastures, woods and cultivated lands, and in all other things pertaining to those lands and tenements. And if by chance all the extensors elected do not come on that day, or when they have come, they are not willing to make the extents, then place in their stead other loyal and discreet men, whom you may find more useful for this purpose, and cause that extent and valuation to be made by their oaths, according to what is aforesaid, in such a manner that such extent shall not by any means be deferred beyond that day. And know ye that the aforesaid persons have found sureties to produce their extensors, to wit, elected by the parties and above nominated, on the same day. And cause it to be made known to us evidently, distinctly, and openly, or to such our judges at such a place on such a day, that extent and appraisement under the seals of the aforesaid extensors. In testimony of which thing, &c. Witness, &c. Likewise another form of the same, and if those of that county are rebels, in what way others are to be assumed in their place to make the extent.

to make a partition.

4. Of appointing justices to take part

The king to his beloved and faithful so-and-so greeting. Know ye, that we have appointed you our justices, to take part in an extent and appraisement to be made

ut intersint partitioni.

tali honore cum pertinentiis, ita quòd extentio illa & appc̃iatio fiat corā vobis, tali die apud talem locum, p A. B. C. D. electos ex parte talis, per D. E. F. electos ex parte talis, si omnes tunc coram vobis præsentes fuerint, & si non, vel si præsentes fuerint & sint rebelles, quò minùs extentio illa fieri possit, tunc alios legales milites assumatis vobis, ex illis quos vic. noster tali coram vobis ibidem venire faciet, loco p̃dictorū militum, p quos extentio & appreciato illa meliùs fieri possit, & qui nec p̃dictum talem & talem aliqua affinitate attingant, & per eorum sacramentum fieri faciant extentionem & appc̃iationem illam in hac forma, scilic. q oñs terræ & omnia tenementa extendantur, secundùm quod supradictum est. Præcipimus etiam vic. nostro tali, q venire faciat coram vobis ad p̃dictum diem talem tam milites quàm alios legales homines, p quos negotium illud meliùs expediri possit. Et ideò vobis mandamus q oñi occasionem postposita, p̃dict' loco & die conveniatis, ad p̃dictā extentionem & appc̃iationē faciendā, secund' formā p̃dictū, & cū facta fuerit, tunc valorem oñium terraꝝ illarū & tenementorū illorū imbreviari faciatis, & illā imbreviationē habeatis corā justic. nostris tali loco, tali die, & q citò extensio illa & appreciatio facta fuerit, vos, una cum p̃dicta vic. nostro, statī habere faciatis prædicto tali plenariā seysinam de honore prædicto cū ptinentiis; exceptis terris & teneñtis, q̃ prædictus talis aliis inde dedit in feodo, & q̃ quidem appreciantur & extendātur p se, & inde valores p se similiter imbreviantur, ut nos vel justitiarios nostros tales inde reddere possitis certiores. Teste, &c. Cùm autem extensores ex cōmuni consensu

f. 72 b.

between such and such persons, concerning such an honour with its appurtenances, so that the extent and appraisement may be made before you on such a day at such a place by A. B. C. D. elected on the part of such a person, and by D. E. F. elected on the part of such a person, if all shall then be present before you, and if not, or if they be present and are rebellious, so that the extent cannot be made, assume other loyal knights to yourselves out of those whom our said sheriff shall cause to come before you in the stead of the aforesaid knights, by whom that extent and appraisement may be the better made, and who do not touch the aforesaid so-and-so by any affinity, and by their oaths cause to be made that extent and appraisement in this form, to wit, that all the lands and all the tenements be extended according to what has been above said. We enjoin also our said sheriff, that he cause to come before you on the same day aforesaid as well the knights as other loyal men, through whom that business may the better be accomplished. And accordingly we command you that, putting aside all other business, you assemble at the aforesaid place on the aforesaid day, to make the said extent and appraisement according to the form aforesaid, and when it has been made, you cause to be reduced into writing the value of all those lands and those tenements, and produce that writing before our justices in such a place on such a day; and as soon as that extent and appraisement has been made, you with our aforesaid sheriff cause forthwith plenary seysine of the aforesaid honour with its appurtenances to be made to the aforesaid so-and-so; with the exception of the lands and tenements which so-and-so aforesaid has given to others in fee, and which should be extended and appraised apart, and thereupon their values by themselves be similarly stated in writing, so that you may certify us or our said justices thereupon. Witness, &c. But when the extensors are elected by the common consent of the parties to make

in the partition.

f. 72 b.

partium eliguntur ad extentionem & appreciationem faciendā, tunc fiat breve extensoribus electis, in hac forma ex parte regis.

5. Breve, cum partes elegerint aliquos de communi assensu ad partitionem faciendam.

Rex A. B. C. D. salutem. Sciatis q̄ A. de N. & B. de N. in curia nostra corā, &c. elegerunt vos, ut p̄ sacramentum vestrū extendantur & appreciātur oñs terræ, & oñia tenementa de tali honore, & unde contentio fuit inter eos, & unde concordati sunt in curia nostra corā justic. nostris talibus, & ita q̄ si un⁹ vestrū interesse non possit, q̄ alius talis ponatur in loco ejus, & sic de oñb⁹ aliis nominatis. Et ideò vobis mandamus, firmiter præcipientes, quaten⁹ tali die conveniatis apud talem locū, vel alibi, ubi meliùs & faciliùs convenire possitis, & facto sacrañto corā vic. tali legaliter & discretè & rationabiliter extendatis, & appreciari faciatis, omnes terras & omnia tenementa de prædicto honore, & tam illa tenementa, quæ prædictus A. inde dedit quàm alia, sc. in dominicis, villenagiis, &c. ut suprà, & illam extentionem & ap̄ciationem scire faciatis justic. nostris talibus, tali loco, tali die. Mandavimus etiam vic. nostro tali, quòd ad prædictum locum & diem, vobis occurrat, ad sacramenť vestrum capiendum, & q̄ tunc coram vobis venire faciat omnes illos de prædicto honore, & alios de coñ tuo, quos viderit esse vocandos, & per quorū sacramentum auxilium habere possitis, ad extensionem illam & appreciationem faciendam. Et scire faciatis præfatis justic. nostris ad prædictū diē, quot homines & quos idem B. feoffaverit, & de quibus tenementis, & valor & precium illorum tenementorum p̄ se imbrevientur. Et si omnes vestrū interesse non possitis, tot ex vobis ad minus

the extent and the appraisement, then let a writ issue to the extensors so elected in this form, on the part of the king.

5. A writ when the parties have chosen by common consent certain persons to make the partition.

The king to A. B. C. D. sends greeting. Know ye that A. of N. and B. of N. in our court before us, &c. have elected you, that by your oaths all the lands and all the tenements of such an honour may be valued and appraised by your oaths, and about which there has been contention amongst them, and about which they have agreed in our court before certain of our justices, and so that if one of you cannot be present, that such an other person shall be placed in his stead, and so respecting all the other persons nominated. And accordingly we command, firmly enjoining you, that on such a day assembling at such a place or elsewhere, where you may better and more easily assemble, and having taken an oath before such a sheriff you loyally and discreetly and reasonably value and cause to be appraised all the lands and all the tenements of such an honour, and as well those tenements which the aforesaid A. has thence given as the others, to wit, in the domains, villenages, &c. as above, &c., and that you make known that valuation and appraisement to our said justices at the said place on the said day. We have likewise commanded our sheriff that he should meet you at the aforesaid place on the aforesaid day to take your oaths, and that he cause to come before you all persons from the aforesaid honour and others of your county, whom he may see ought to be called, and by whose oath you may have aid to make the said valuation and appraisement. And make ye it known to our aforesaid justices on the aforesaid day, how many men and whom the said B. has enfeoffed, and of what tenements, and let the value and price of those tenements be committed to writing by itself. And if all of you cannot be present, let so many at least take part in the performance of

intersint ad prædicta exequēda. In cujus rei testimonium, mittimus vobis has literas nostras patentes. Teste, &c. Item aliud breve de eodem, & ubi causatur partitio, eò q minùs bene facta est, & ubi constituuntur tres justitiarii ꝑpter p̃sumptionem extensoř.

6. Breve alterius modi, sed de eodem, ubi partitio minus recte facta est per alios.

Rex dilectis & fidelib⁹ suis salutem. Sciatis q nos, ad petitionem dilectoř & fidelium nostrorum A. & B. constituimus vos justic. nostros ad faciendam extentionem & partitionem inter prædictum B. & tales filias & hæredes talis, quæ sunt in custodia ipsius A. de omnibus terris & tenementis, quæ fuerunt C. de N. in coñ tali, & unde prædicti A. & B. conquesti sunt, quòd partitio, inde priùs facta per præceptum nostrum, facta fuit minùs rationabilitèr, quam deberet. Et ideò vobis mandamus, quòd assumpto vobiscum vic. nostro tali, cui dedimus in mandatis, quòd una vobiscum sit ad faciendā partitionem illā, quàm citiùs poteritis accedatis ad omnes terras & tenementa, quæ fuerunt prædicti C. in prædicto coñ, & convocatis coram vobis xij. vel vj. legalibus hominib⁹ de qualibet villa, secundùm q meli⁹ expediri videritis, ꝑ eorum sacrañta extendi et appreciari faciatis quamlibet villam per se in dominicis et villenagiis &c. ut suprà, secundùm q modo sunt, et in eodem statu quo nunc sunt, in omnibus rebus quæ extendi & appreciari possunt et debent. Et facta taliter extensione, quælibet villa dividatur per medium, ita quòd medietas cujuslibet villæ æqualis sit alteri medietati ejusdē villæ, & facta sic divisione, mittatur fors super utramꝙ medietatem, et ꝑ sortem assignetur utriꝙ parti sua medietas, salva tamen ipsi A. sua æsnetia, et cōputentur eidem A. in parte sua omnes terræ et omnia teneñta, quæ idem A. dedit, secundùm valorem illarū terrarum datarum. Et ad omnem cōtentionis occasionem tollendā, quæ oriri possit inter eos et

what is aforesaid. In testimony of which we send you these our letters patent. Witness, &c. Likewise another writ on the same subject.

6. A writ of another kind, but on the same business, where a partition has not been well made by others.

The king to his beloved and faithful sends greeting. Know ye that we, at the petition of our beloved and faithful A. and B., have appointed you our justices to make an extent and partition between the aforesaid B. and so and so, the heirs and daughters of such a person, who are in the wardship of A. himself, concerning all the lands and tenements which belonged to C. of N. in such a county, and of which the aforesaid A. and B. have complained, that the partition of them, previously made by our ordinance, has been made less reasonably than it ought to be. And accordingly we command you, that having associated with yourselves so and so, our sheriff, to whom we have sent our command, that he shall attend you to make that partition, you shall go as speedily as possible to all those lands and tenements, which belonged to the aforesaid C. in the aforesaid county, and having called before you twelve or six loyal f. 73. men of each vill, according as it shall seem most expedient to you, you shall cause to be valued and appraised by their oaths each vill by itself in its domains and villenages, &c. as above, according to the mode in which they are, and in the same state in which they are, in all things which may and ought to be valued and appraised. And upon such a valuation having been made, let each vill be divided down the middle, so that one half of each vill shall be equal to the other half of the same vill, and upon a division having been so made, let the lot be cast for each part, and let to each party be assigned his mediety, saving however to A. himself his elder child's privilege, and let there be computed to the same A. in his part all the lands and all the tenements, which the said A. gave according to the value of those lands so given. And to remove all cause of contention, which can arise between them and their bailiffs, and in order

ballivos eorum, et ut sic in qualibet villa terræ partitæ et divisæ inter eos sine cõtentione remaneant, de cõsensu partium ꝑvisum est & concessum, quòd unicuiq; ipsorum habere faciatis partem ꝑ se, & ita ꝙ portio, quæ per sortem acciderit prædictis filiabus in aliqua villa, quæ, si integra remaneret, cõpetens esset ipsi A. et necessaria cum sua parte, tũc eidem A. integrè remaneat partitio illa cum parte sua, et ita quòd integrè habeat totam villam illam. Et eodem modo, vice versa, fiat in alia villa de parte ipsius A. quæ, si villa integra remaneret, competens et necessaria esse posset prædictis filiabus & assignetur portio prædicti A. in villa illa ad valentiam illius portionis quam prædict⁹ A. habuit de portione prædictarum filiarum in alia prædicta villa, secundùm ꝙ quælibet villa & terra extensa fuerit, et ita quòd prædictæ filiæ habeant integrè totam villã illã. Et si portio unius in una villa minor sit portione alterius in alia villa, ei, qui minus habuerit, ad quod defuerit, perficiatur alibi in loco competenti de portione ejus, qui plus habuerit, ita quòd quilibet earum æqualem habeat portionem computatis terris datis &c. Et salva ipsi A. æsnetia sua. In cuj⁹ rei testimonium &c. Teste &c. Est etiam aliud breve, quod istud breve præcedit, & ubi justic. minùs ritè ꝓcesserunt, & de quo sequitur istud breve præcedens, quòd tale est, & quod directum fuit vic.

7. Breve de eodem, sed istud deberet præcedere proximo præcedens.

Rex vic. tali salutem. Sciatis quòd reddimus A. ad opus filiarum & hæredum B. quarum custodiã idem A. habet, per finem quem fecit nobiscum, & custodiã medietatis omnium terrarum & tenemẽtorum cum pertinentiis, quæ fuerunt prædicti C. in balliva tua, ut

that the lands so parted and divided in each vill between them may so remain without dispute, with the consent of the parties it has been provided and conceded, that you shall make each of them have a part by himself, and so that the portion which shall fall by lot to the daughters aforesaid in any vill, which if it remained entire would belong to A. himself and be necessary for him with his part, shall thereupon remain entire to A. with his part, and so that he shall have the whole vill. And in the same way conversely, let it be done with the part of A. himself, in another vill, which if the vill remained whole, would belong to and might be necessary for the aforesaid daughters, let there be assigned a portion of the aforesaid A. up to the value of that portion, which A. aforesaid had from the portion of the aforesaid daughters in another vill, according as each vill and land has been valued, and so that the aforesaid daughters may have in its entirety the whole of that vill. And if the portion of one in one vill be less than the portion of the other in another vill, to that one, who has had less, to supply the deficiency let there be granted elsewhere in a suitable place from the portion of that one, who has had more, so much, that each of them shall have an equal portion upon the computation of the lands given, &c., and saving to A. himself his elder child's privilege; in testimony of which, &c. Witness, &c. There is likewise another writ, which precedes that writ, and where the justices have not proceeded in due manner, and upon which there follows the preceding writ, which is such and is directed to the sheriffs.

7. A writ on the same subject, but the writ next but one before it ought to precede.

The king to such a sheriff sends greeting. Know ye that we have restored to A. for the use of the daughters and heirs of B., whose wardship the said A. has, through the fine which he has made with us, the wardship also of the mediety of all the lands and tenements with the appurtenances, which belonged to the aforesaid C. in

rationabilem portionem dictarū filiarū prædictarum terrarū & tenem̃torum, quæ eas contingit de hæreditate ipsius C. &c. unde B. qui habet aliam medietatem earundem terrarum, quæ fuerunt ejusdem C., est particeps earum de prædicta hæreditate, & unde convenit in curia nostra coram &c. inter prædictos B. & A. quòd omnes terræ illæ, cum omnib⁹ pertinentiis suis, quæ fuerunt prædicti C. extendantur & appreciantur, & posteà inter eas dividātur, salva tamen eidem B. æsnetia sua, & cùm terræ illæ extensæ fuerint & appreciatæ, idem B. habeat partem suam p̱ se, sine parte quam idem A. habeat cum eo, ita quòd omnes terræ cum omnibus pertinentiis, quas prædictus B. prius dedit de terris quæ fuerunt prædicti C. computentur eidem B. in parte sua, secundùm valorem illarum terrarum datarum, & ita etiam, q̱ cùm medietas prædictarum ῖrarum assignata fuerit eidem A. idem A. habere faciat eidem B. de medietate, quam recuperat ad op⁹ prædictarum filiarum, tantundem ῖræ in loco cōpetenti. Et ideò tibi præcipim⁹, q̱ assumptis tecum discretis &c. p̱ quos extensionē & appreciationē & participationem illā meliùs facere poteris, in p̱pria p̱sona tua accedas apud talem locum, tali die, & p̱ eorum sacram̃tum terras illas cum p̱tinentiis, in omnib⁹ reb⁹ extendi & appreciari facias, & unicuiq̱ ipsorum A. & B. partem suā habere facias & assignari, salva eidem B. ut prædictum est æsnetia sua, et salvo eidem B. tanto terræ de medietate ipsius A. per eādem extensionem, per quam idem A. recuperavit. Præcipim⁹ etiam tibi, q̱ de exitibus medietatis ejusdem terræ quam cepisti in manum nostram p̱ præceptum nostrum, & qui inde pervenerunt, dum fuit in manu nostra, habere facias unicuiq̱ ipsorum secundùm partem suam, quam habuit

f. 73 b.

your bailliwick, as a reasonable portion of the said daughters in the aforesaid lands and tenements, which pertains to them of the inheritance of the said C. &c., and whereas B., who has the other mediety of the same lands, which belonged to the same C., is parcener with them in the aforesaid inheritance; and whereas it has been agreed in our court before &c. between the aforesaid B. and A., that all those lands, with all their appurtenances, which belonged to the aforesaid C., shall be valued and appraised and afterwards divided between them, saving always to B. his elder child's privilege, and when those lands have been valued and appraised, the said B. shall have his share for himself, without the part which the said A. has with him, so that all the lands with all their appurtenances, which the aforesaid B. first gave of the lands, which belonged to the aforesaid C., be computed to the same B. in his share, according to the value of those lands given, and so likewise that, when the mediety f. 73 b.
of the aforesaid lands shall be assigned to the said A., the said A. shall cause B. to have from the mediety, which he recovers for the use of the aforesaid daughters, as much land in a suitable place. And accordingly we enjoin you that having associated with yourself discreet, &c. through whom you can the better make that valuation and appraisement and partition, you visit in your own person such a place on such a day, and by their oath cause those lands with their appurtenances to be valued and appraised in every particular, and shall cause to be assigned to each of the said A. and B. his share, saving to the said B. as aforesaid his elder child's privilege, and saving to the said B. as much land of the mediety of A. himself by the same valuation, by which the said A. has recovered. We enjoin you also, that from the revenues of the mediety of the same land, which you have taken into our hands by our order, and which have been received whilst it was in our hands, you cause each of them to have according to his share, which he has ob-

p prædictam partitionem, et sive prædicti A. et B. venerint sive non, non remaneat ꝑ̃ absentiam ipsorum aut alicuj⁹ ipsorum, quin terræ illæ extendantur & apprecientur et dividantur modo quo prædictum est, & ita te habeas in hoc negotio &c. Teste &c. Est & alia forma brevis de extensione facienda de cõsensu partium p concordiã, et dirigitur vic.

8. Breve de seysina facienda cohæredibus, cum convenerit inter eos de partitione.

Rex vic. salutem. Scias, q cõvenit inť A. petentem & B. tenentẽ, de tali manerio cum ptinentiis in tali coñ, et de alio manerio cum ptinentiis in coñ tali, et sic si plura maneria fuerint in diversis coñ de quib⁹ fieri debet partitio inter partes, & tunc sic[1] dicatur, s. q medietas omnium terrarum prædictarum remaneat ipsi A. & hæredib⁹ suis quietè de ipso B. & hæredib⁹ suis imperpetuum, & alia medietas cum ptinentiis cum omnib⁹ rebus remaneat eidem B. & hæredibus suis quietè de ipso A. et hæredib⁹ suis imperpetuũ, ita tamen q, cùm omnes terre et feoda omnium prædictorum honorũ in omnib⁹ reb⁹ p legales homines, de consensu ipsorũ A. & B. electos, extenta fuerint & appreciata rationabiliť, A. et hæredes sui habebunt medietatẽ suam de tali honore & tali, et B. & hæredes sui habebunt suã medietatem de tali honore & tali. Et si alicui ipsorum aliquid defecerit in prædictis honoribus de medietate sua id q ei defuerit, ꝑficietur ei de tali honore, loco cõpetenti. Et ideò tibi præcipimus, quòd assumptis tecum &c. ut suprà. Item aliud breve de eodem, si p concordiã.

9. Item aliud de eodem

Rex vic. salutem. Scias quòd cùm A. in curia nostra &c. peteret versus B. tantam terram cum pertinen-

[1] "si," MS. Rawl.

tained by the said partition, and whether the aforesaid A. and B. have come or not, it shall not be delayed on account of the absence of them or of either of them, that those lands should be valued and appraised and divided in the manner aforesaid, and so conduct yourself in this business, &c. Witness, &c. There is also another form of writ for making a valuation with the consent of parties by a concordat, and it is directed to the sheriff.

8. A writ of giving seysine to co-heirs, when they have agreed about the partition.

The king to the sheriff greeting. Know, that it has been agreed upon between A. the claimant and B. the tenant, concerning such a manor with its appurtenances in such a county, and concerning another manor with its appurtenances in another such county, and so on, if there be several manors in different counties, of which there ought to be a partition amongst parties, and then if it be said, to wit, that the mediety of all the aforesaid lands shall remain with A. himself and his heirs undisturbed by B. himself and his heirs for ever, and the other mediety with its appurtenances in every respect shall remain with B. and his heirs, undisturbed by A. and his heirs for ever, in such manner however that, when all the lands and fiefs of all the aforesaid honours have been by loyal men with the consent of A. and B. themselves in all things valued and appraised reasonably, A. and his heirs shall have their mediety of such and such honour, and B. and his heirs a mediety of such and such honour. And if to any of them there shall be any thing wanting in the aforesaid honours of their mediety, that which is wanting to them shall be made good from such an honour in a suitable place. And accordingly we enjoin you, that having associated with you &c., as above. Likewise another writ on the same subject, if there has been a concordat.

9. Likewise another

The king to the sheriff sends greeting. Know, that whereas A. in our court &c., has claimed against B. so

si particeps tenens cognoverit particip partem suam, et quod fiat extensio.

tiis in tali villa, ut rationabilem partem suam, quæ eum cōtingebat de hæreditate C. patris, vel alterius antecessorum prædictorum A. & B., cujus hæredes ipsi sunt; idem B. venit in eadem curia, et recognovit totam prædictā terrā cum ptinentiis esse jus ipsi[9] A. ut rationabilem partem suā, quæ cōtingebat de prædicta hæreditate, habendum & tenēdum prædicto A. &c. et ideò tibi præcipim[9], quòd assumptis tecum discretis & legalib[9] hominib[9] de proximo vicineto talis villæ, in propria psona tua accedas ad talem terram, & per eoꝝ sacramentum terram illam extendi facias & appreciari in dominicis, villenagiis, et servitiis liberorum hominum, in pasturis, boscis, & omnibus aliis rebus, et cùm extensio et appreciatio ista facta fuerit, tunc p eorundē sacrāmtum totā terrā illam cum ptinentiis æqualiter partiri facias in duas partes, et ita, q quælibet pars æqualis sit alteri, et facta sic partitione, unicuiq; ipsorū partem suam habere facias et assignari, salvo tamen eidem B. tanto trāe, quam sibi et hæredibus suis retinet sine parte, salva etiam eidem A.[1] æsnetia sua. Et quid, et ubi, et p quas particulas unicuiq; eorū partē suam assignaveris, scire facias nobis vel justic. nostris &c. tali loco, tali die, evidēter, distinctè et apertè, p literas tuas sigillatas, & p quatuor legales homines ex illis p quas[2] partitio illa facta fuerit. Et habeas ibi hoc breve, et nomina illorum, p quorum sacramentum partitionem illā feceris. Teste &c.

10. Breve, quod quis eat ad capiendum sacramentum de extensoribus,

Rex vic. salutem. Præcipimus tibi, q omni dilatione postposita, sis tali die & tali loco, ad capiendum sacrāmtum de tali & sociis suis, electis ad extensionem et appreciationem faciendā de trīs & tenēmtis de tali honore, secundùm q in literis nostris patentibus, quæ

[1] "A.," omitted MS. Rawl. | [2] "quos," *id.*

much land with its appurtenances in such a vill, as his reasonable share, which has fallen to him from the inheritance of C. his father or another of the aforesaid ancestors of A. and B., whose heirs they are; the said B. has come into our court and has acknowledged, that the whole of the aforesaid land with its appurtenances is the right of A. himself, as his reasonable share, which has devolved to him of the aforesaid inheritance, to have and to hold to the said A. &c., and accordingly we enjoin you that, having associated with yourself discreet and loyal men of the immediate vicinity of the said vill, you visit in your own person the said land, and by their oath cause that land to be valued and appraised in the domains, the villenages, and the services of freemen, in the pastures, woods, and all other things; and when that valuation and appraisement has been made, then by their oath you cause the whole of that land with its appurtenances to be divided equally into two parts, and so that either part shall be equal to the other, and upon a partition having been so made, you cause to be assigned to each party his own part to have, saving, however, to the same B. so much of the land, which he retains for himself and his heirs without his part, saving also to the said A. his elder child's privilege, and what and when and by what divisions you have assigned to each of them his share, make ye known to us or to our justices, &c., at such a place, on such a day, evidently, distinctly, and openly by your sealed letters and by four loyal men of those, by whom that partition has been made. And have there with you this writ and the names of those by whose oath you have made that partition. Witness, &c.

writ on the same subject, if the tenant parcener has acknowledged to the other parcener his share, and that there should be a valuation.

10. A writ that some one should go to administer the oath to the valuers, if a valuation

The king to the sheriff sends greeting. We enjoin you, that setting aside all delay, you be on such a day at such a place to take an oath from so-and-so and his associates, elected to make a valuation and an appraisement of the lands and the tenements in such an honour, according to what is contained in our letters patent,

si facienda sit extentio extra comitatum.

ibi inde ostendentur, continetur, & si op⁹ fuerit, coram eisdem militib⁹ venire facias alios de prædicto honore, quos prædicti milites ad hoc vocari voluerint, ut eisdem militibus super sacrām̃tum suum sint auxiliantes, ad prædictā extensionē & appreciationem faciendā, & cùm extensio illa et appreciatio rationabiliter facta fuerit, plenariam seysinam habere facias tali, de omnibus terris & tenem̃tis de prædicto honore cum pertinentiis. Teste &c. Milites quandoq; ad primum præceptum regis non veniunt ad faciendam extensionem, vel fortè cùm venerint, vic. negligenter faciat q ei junctum vel jussum est,[1] et, unde si milites nō venerint, fiat eis iterum tale breve.

11. Breve, ubi extensores nihil fecerunt ad primum mandatum.

Rex dilectis & fidelib⁹ suis A. B. C. D. salutem. Satis recolimus, vobis aliàs dedisse in mandatis, quòd A. et B. in curia nostra coram &c. eligerunt vos de communi cōsensu eorum, ut p sacrām̃tum vestrum extendantur & apprecientur omnes terræ & omnia tenem̃ta de tali honore, unde cōtentio &c. ut suprà. Et quia tunc ad mandatum nostrum nihil inde fecistis, iteratò vobis mandamus, & in fide, qua nobis tenemini, firmiter præcipimus, quatenus omni occasione et dilatione postpositis, conveniatis tali loco et tali die, et facto sacrām̃to coram vic. nostro tali, vel coram dilectis et fidelib⁹ nostris A. et B. quos ad hoc justic. constituimus, vel altero ipsorum, si ambo interesse non possunt, legaliter et discretè et rationabiliter extendatis et appreciatis omnes terras et tenementa &c. ut suprà. Et extensionem et appreciationem illam scire faciatis justic. nostris apud W. vel prædictis A. & B. justic. ad hoc cōstitutis, vel alteri eorū sub sigillis vestris, ut ipsi justiciarii justic. nostros apud W. ad

[1] "quod ei injunctum est," MS. Rawl.

which will be there exhibited, and if it should be necessary, you shall cause to come before the said knights other persons from the said honour; whom the said knights shall wish to be called, that they may be assisting to the said knights on their oath to make the aforesaid valuation and appraisement; and when the said valuation and appraisement shall have been reasonably made, you shall cause full seysine to be made to so-and-so of all the lands and tenements of the aforesaid honour with its appurtenances. Witness, &c. The knights sometimes do not come at the first precept of the king to make the valuation, or by chance, when they come, the sheriff does negligently, what has been enjoined or ordered to him, and, thence if the knights have not come, let such a writ be again issued to them.

is to be made out of the county.

11. A writ when the valuers have done nothing upon the first order.

The king to his beloved and faithful A. B. C. D. greeting. We sufficiently recollect that we have at another time warned you by our mandate that A. and B. in our court before &c., have chosen you of their common consent, that by your oath all the lands and all the tenements of such an honour shall be valued and appraised, and the tenements of such honour, whence contention has arisen &c., as above. And because thereupon you have done nothing upon our mandate, we command you a second time and firmly enjoin you by the allegiance, in which you are bound to us, that laying aside all pretext and delay, you assemble at such a place and on such a day, and having taken an oath before so-and-so, our sheriff, or before our beloved and faithful A. and B., whom we have appointed justices for this business, or either of them, if both cannot be present, you value and appraise loyally, discreetly, and reasonably all the lands and tenements &c., as above. And make known that valuation and appraisement to our justices at Westminster, or to the aforesaid A. and B. appointed justices for this business, or to either one of them under your seals, that those justices may more fully certify our justices at

diem eis datum pleniùs certificare possunt. In cujus rei testimonium &c. Teste &c. Si autem, cùm milites venerint vic. negligens fuerit, tunc fiat vic. tale breve.

12. Breve, si milites venerint et vicecomes negligens fuerit.

Rex vic. salutem. Mandavim⁹ p literas nostras patentes talibus militibus, quòd tali die convenirent apud talem locum, et facto sacrām̃to corporali, legaliter discretè & rationabiliter extenderent et appreciari facerent omnes terras et tenem̃ta de tali &c. unde concordia facta fuit inter A. et B. secundùm q in literis nostris patentibus, quas eisdem militibus inde transmittim⁹, pleniùs continetur. Mandavimus etiam tibi, quòd omni occasione postposita, esses ibidem ad eundem diem, ad
f. 74 b. capiendum sacramentum prædictorum militum, ad extensionem & appreciationē illam faciendā de terris et tenem̃tis prædicti honoris, & secundùm q pleniùs cōtinebatur in literis nostris patentib⁹, & q, facta extensione, plenariā seysinā habere facias prædicto A. de omnibus terris &c. ut suprà. Exceptis terris &c. ut suprà. Et unde ostēsum est nobis, ex parte prædicti A. quòd prædicti milites nihil inde fecerunt, et quòd tu p negligentiā tuā pmisisti prædictos A. & B. et prædictos milites recedere sine die, negotio penit⁹ infecto. Et quia minùs diligenter, & minùs discretè te tunc habuisti in negotio illo, iterato tibi præcipimus, sicut tunc tibi præceperim⁹,[1] quòd in fide, qua nobis &c. sis apud talē locum tali die &c. ut suprà. Et si aliquis ex prædictis militib⁹ electis ex parte alicujus prædictorum A. & B. ad prædictum diem coram te nō venerint, tunc alios ponas loco eorum, ad extensionē et appreciationem illam faciendam, et redditus et exitus terrarū illarū salvo custodiantur. Teste &c.

[1] "præcepimus," MS. Rawl.

Westminster on the day appointed to them. In testimony of which thing &c. Witness, &c. But if when the knights have come, the sheriff should be negligent, then let a writ of this kind go to the sheriff.

12. A writ, if the knights have come, and the sheriff is negligent.

The king to the sheriff sends greeting. We have commanded by our letters patent such and such knights, that they should assemble on such a day at such a place, and having taken a corporal oath should cause to be valued and appraised loyally, discreetly, and reasonably all the lands and tenements of such a person &c., whereupon an agreement has been made between A. and B. according to what is more fully contained in our letters patent. We have also commanded you, putting aside all excuse, to be there on the same day, to take the oath of the aforesaid knights, to make that valuation and f. 74 b. appraisement of the lands and tenements of the aforesaid honour, and according to what is contained more fully in our letters patent, and that upon the valuation having been made you cause the aforesaid A. to have plenary seysine of the said lands &c., as above. Excepting the lands &c., as above. And since it has been shown to us on behalf of the aforesaid A. that the knights aforesaid have done nothing in the matter, and that you through your negligence have allowed the aforesaid A. and B. and the knights aforesaid to go away without fixing any day, the business having been left undone. And because you have conducted yourself in that manner with insufficient diligence and insufficient discretion, we again enjoin you, as we did then enjoin you, that by the allegiance which you owe to us, &c., you be at such a place on such a day, &c., as above: and if any of the knights elected on behalf of either of the aforesaid A. and B. shall not come before you on the appointed day, that you shall then put others into their place to make that valuation and appraisement, and let the revenues and produce of those lands be carefully kept in your custody. Witness, &c. Another writ on the same matter,

Aliud breve de eodē, ubi vic. negligens fuerit et ubi causatur extensio.

13. Breve, si extentio minus sufficienter facta fuerit.

Rex vic. salutem. Benè recolimus, alias tibi præcepisse, quòd assumptis tecū xii. &c. ita inseratur totum factum ut suprà, et in fine dicatur, Et unde nihil inde fecisti ut audivimus; vel aliter, Et unde prædict⁹ A. queritur, q prædicta extensio & partitio minùs sufficienter facta fuit, eò quòd eidē A. non assignasti ad partem suā, nisi tertiā partem illius terræ, et ubi ei assignasse debuisti medietatem, vel quid tale: & ita quòd tota querela querētis inseratur. Et ideò tibi præcipim⁹ sicut aliàs tibi præceperim⁹,[1] quòd assumptis tecū iij. &c. ut sup̄. Et in fine addatur istud cōminatoriū. Et ita te habeas in hoc negotio, ne p̄ negligentia tua, vel p̄ cōtemptu huj⁹ præcepti nostri, nos ad te graviter capere debeamus. Et notandum, quòd semper variantur brevia ad extensiones faciendas, secundùm varietatem dictorū, recordorū & cōcordiarum, secundùm q inferiùs pleniùs dicetur in tractatu de actionib⁹ in excābiis faciendis. Si autē milites venire debeant de uno com̄ usq; ad aliū com̄, ad faciendā extensionem et appreciationē cum aliis militib⁹ de alio com̄, et q dicitur breve interlaqueatum, tunc fiat in hac forma.

14. Breve interlaqueatum, ubi milites de duobus comitatibus convenire de-

Rex vic. salutem. Præcipim⁹ tibi, q ad diem et locum quem dilecti et fideles nostri tales tibi scire faciant, venire facias corā eisdem, octo tam milites, quàm alios, liberos et legales &c. p̄ quos negotium meli⁹ expediri possit, ut p̄ eor̄ sacrām̄tum simul cum xij. in tali com̄ elect⁹, extendātur et appreciātur tales

[1] "præcepimus," MS. Rawl.

where the sheriff has been negligent and where the valuation is called in question.

13. A writ, if the valuation has been insufficiently made.

The king to the sheriff sends greeting. We well recollect, that we on another occasion enjoined you that, having associated to yourself twelve, &c. Let the whole writ be inserted as above, and at the end let it be said, " and whereof you have done nothing, as we have " heard;" or otherwise, and whereof the aforesaid A. complains, that the aforesaid valuation and partition have been insufficiently made, inasmuch as you have assigned to the aforesaid A. for his part only a third part of that land, when you ought to have assigned to him a mediety or something of that sort: and so that the whole complaint of the complainant be inserted. And accordingly we enjoin you, as we have at other times enjoined you, that having associated with yourself twelve, &c., as before. And at the end let there be added this warning: "And so conduct yourself in this matter, " lest by your negligence or by your contempt of this " our injunction, we ought to take serious notice of " you." And it is to be noted that the writs are *always varied for making valuations* according to the variations of the orders, the records, and the agreements, according as will be more fully explained in the treatise on actions in making exchanges. But if the knights ought to come from one county to another county to make a valuation and an appraisement with the knights from another county, and which is called an *interlaced* writ, then let it be made in this form.

14. An interlaced writ, where knights from two counties ought to meet to make a valuation.

The king to the sheriff sends greeting. We enjoin you that on the day and at the place which our beloved and faithful so-and-so will make known to you, you cause to come before them, eight as well knights as other free and loyal persons, &c., through whom the business may the better be expedited, so that by their oath, together with twelve elected in such a county, such lands in

bent ad faciendam extensionem.

ĩræ in dominicis, villenagiis &c. ut suprà; et secūdùm q in literis nostris patentibus, eisdem talib⁹ justic. nr̃is ad hoc cōstitutis directis, pleniùs continetur. Et habeas &c. Teste &c. Item aliud breve de eodē, et ubi causatur partitio & extensio, cùm partitio facta fuerit.

15. Breve de eodem.

Rex vic. salutem. Præcipim⁹ tibi q sine dilatione eligas xij. milites de com̃ tuo vel de com̃ tuis, qui secūdum cōsuetudinem regni Angliæ faciant partitionem de doñicis terris, quæ fuerint A. in com̃ tuo, et quæ hæreditariè cōtingunt B. & E. sororem suam. Et tunc prædictis B. et E. habere facias rationabiles partes suas, secundùm q partitio illa facta fuerit p eosdē milites. Teste &c. Et posteà, si causetur partitio illa, q minùs rationabiliter facta sit, iterum præcipiat vic. quòd extensionem et partitionem illam corrigat et
f. 75. emendet, vel si suspect⁹ habeatur, cōstituantur justic. secundùm q superiùs sumi poterit exemplum. Si autem partes interesse noluerint fortè extēsioni & appreciationi, vel partitioni ad partem suam recipiendā, nihilominùs ꝓcedāt, ad præceptum domini regis justic. vel vic. p tale breve, cùm un⁹ particeps negetur esse cohæres.

16. Breve de querela filiæ primogenitæ et participis, quæ non habet rationabilem partem suam, nec æsnetiam,

Rex vic. salutem. Ostensum est nobis ex parte A. & B. uxoris ejus, quòd cùm ipsa B. particeps sit, & cohæres C. & B. filiarum & hæredum E. de tota hæreditate ipsius E. et filia primogenita ipsius E. Ipsi A. & B. æsnetia ipsius B. non habet[1] partē suam rationabilem, ut deberent, secundùm regni nostri cōsuetudinē. Et cùm teneamur unicuiq; de regno nostro justitiam exhibere, tibi præcipimus, quòd scire facias prædictis

[1] "æsnetiam ipsius B. non habent, nec," MS. Rawl.

domains, and villenages, &c. may be valued and appraised, &c., and according to what is more fully contained in our letters patent directed to our said justices appointed for this purpose. And have, &c. Witness, &c. Likewise another writ on the same subject, and where the partition and valuation is found fault with, when the partition has been made.

15. A writ of the same character.

The king to the sheriff sends greeting. We enjoin you that without delay you choose twelve knights of your county or of your counties, who shall make a partition according to the custom of England of the demesne lands, which belonged to A. in your county, and which by inheritance belong to B. and E. his sister. And thereupon cause the aforesaid B. and E. to have their reasonable shares, according as the partition may have been made by the said knights. Witness, &c. And afterwards if that partition is found fault with, as not being sufficiently reasonable, let him again enjoin the sheriff to correct and amend that valuation and partition, or if he be suspected, let justices be appointed according to what may be taken for an example above. But if the parties are by chance unwilling to be present at the said valuation and appraisement, and at the partition to receive their shares, nevertheless let the justices or the sheriff proceed upon the injunction of the lord the king in virtue of such a writ [as follows], when one parcener is denied to be a co-heir.

f. 75.

16. A writ on the complaint of a first-born daughter and parcener, who has not her reasonable share and her option by right of

The king to the sheriff greeting. It has been shown to us on the part of A. and B. his wife, that since B. herself is a parcener and co-heiress with C. and D., the daughters and heiresses of E., of the whole inheritance of E., and herself is the eldest daughter of E., the said A. and B. in right of the primogeniture of B. have not their reasonable share as they ought, according to the custom of our realm. And since we are bound to afford justice to every person of our realm, we enjoin you that

et de partitione rationabiliter facienda per milites.

C. et D. quòd sint coram nobis vel justic. nostris tali loco, tali die si voluerint, et sibi viderint expedire, et audituræ partitionē illius hæreditatis & partē suā rationabilem, si voluerint recepturæ. Alioquin in partitione illa & assignatione facienda, ꝑut justū fuerit, nihilominùs ad diem illum ꝑcedem[9], vel ꝑcedas. Teste &c. Et quo casu cùm tales venerint post summonitionē, inquirendum erit ab eis inprimis, si aliquid sciant dicere, quare ipsi quærentes[1] participes esse non debeant, & partem suā cum eis habere, secundùm q̄ quilibet eorum major fuerit nat[9] vel minor, s. antenat[9] vel postnat[9], et quare ille, qui quæritur,[2] habere non debeat æsnetiā suā, & nihil dicere sciāt in cōtrarium cùm venerint, vel si summoniti non veniant, securè ꝑcedat partitio, habita tamen ratione melioratio nis & deteriorationis in ꝑsona cujuslibet hæredis, de tempore, quo quilibet ipsorum habuit in manu sua partē suā. Si autem extensores non venerint ad certificādum regi vel vic. de extēsione, appreciatione, & partitione facta, tunc habeat vic. corpora eorū ꝑ tale breve.

17. De habendis corporibus extensorum ad certificandum.

Rex vic. salutē. Precipim[9] tibi, quòd habeas corā &c. tali loco, tali die, corpora A. B. C. D. extensorum talis manerii, ad certificādum nos vel justic. nostros, qualit̄ & in quib[9] reb[9], & ꝑ quas particulas, et ꝑ quam appreciationē fecerunt extensionē illā, et unde prædict[9] A. dicit, q̄ prædicti extensores extēderunt tali xx. libratas t̄ræ ꝑ decē, et tu ipse tunc sis ibi simul cum prædictis extensoribus, ad certificationē illā faciendā. Teste &c. Et notādū, q̄ si inveniri possit, quòd vic. negligens sit, tepid[9], vel remissus in executione

[1] "querentes," MS. Rawl. | [2] "queritur," id.

you make known to the said C. and D. that they should come before us or our justices at such a place on such a day, if they will, and see it to be expedient to them, and in order that they may hear the partition of that inheritance and receive their reasonable part, if they wish. Otherwise in making that partition and assignment nevertheless on that day we will proceed, or you must proceed, as is just. Witness, &c. And in which case when such persons have come upon the summons, the first inquiry to be made of them is, whether they have not any thing to allege, why the claimants themselves ought not to be parceners and have their part with them, according as each of them is by birth greater or less, that is, elder born or younger born, and why he who complains ought not have his option of primogeniture, and if they know nothing to allege to the contrary, when they have come, or if after being summoned they have not come, let the partition securely proceed, regard being always had to the amelioration or deterioration by the person of each heir, from the time when each of them had his part in his hand. But if the valuers have not come to certify the king or the sheriff respecting the making of the valuation, appraisement, and partition, then let the sheriff have before him their bodies by such a writ.

primogeniture, and of making a partition reasonably by knights.

The king to the sheriff greeting. We enjoin you that you have before you, &c. at such a place, on such a day, the bodies of A., B., C., and D., the valuers of such a manor, to certify us or our justices in what manner and in what things and through what particulars and through what appraisement they have made that valuation, and whence the aforesaid A. says that the aforesaid valuers have valued to such an one twenty pounds worth of land instead of ten, and be you there yourself with the aforesaid valuers to make the certification. Witness, &c. And it is to be noted, that if it be found that the sheriff has been lukewarm or remiss in the

17. Of having the bodies of the valuers to certify.

præceptorum dñi regis, ꝑ defectu ej⁹ præcipietur coronatorib⁹, quòd ipsi exequantur, ut de t̃mino P. anno regni regis H. octavo coñ Wilt̃ de Thoma de Gymeges &c. Item & si tales negligentes extiterint, tunc præcipiatur custodibus eschaetorum.

Cap. XXXIV.

1. De officio extensorum. Britton, l. iii. ch. vii. § 5. Fleta, 157.

Officium autē extensorum est, in reb⁹ hæreditariis extēdendis & appreciandis, q̄ inprimis videant, quid & quantum sit in dñico in quolibet manerio, s. quot acræ terræ arabilis, vel quot virgatæ, & quātum valeat acra vel virgata ꝑ annum. Itē quot acræ in pastura, & quid quælibet acra valeat ꝑ annum. Item q̄ et quantum sit in vasto. Itē quot acræ prati, & quo anno falcari possūt, et quo nō. Itē quot acræ bosci, et q̄ valeāt ꝑ annum, cum persona[1] vel sine. Itē appreciantur gardina. Itē vivaria & piscariæ, si ibi fuerint,
f. 75 b. apprecientur. Et in summa omnia alia, quæ sunt de corpore manerii, & de quib⁹ cōmodum posset evenire. Item quid & quantum sit in villenagio, & quot virgatæ, & quid valeat quælibet virgata ꝑ annum, in redditibus, tallagiis, & omnib⁹ aliis rebus. Posteà verò extendantur servitia liberorum hominum, & redditus. Si autem advocatio ibi fuerit, extendatur & apprecietur advocatio, simul cum aliis rebus hæreditariis, s. ꝑ qualibet marca, secūdùm valorem ecclesiæ, extendantur xii. denarii, ut si ecclesia singulis annis, secundū cōmunem æstimationem, valeat C. marc. apprecietur advocatio ad C. s. Facta autē extensione & appreciatione, ut prædictum est, causari poterunt & calumniari

[1] "ɒessona," MS. Rawl. "Pessona" signifies the "mast" or nut of the beech tree.

execution of the injunction of the lord the king, on the ground of his failure it shall be enjoined to the coroners, that they make the valuation as in Easter Term, in the eighth year of the reign of King Henry, in the county of Wilts, concerning Thomas of Gymeges, &c. Likewise if the coroners be negligent, then let orders be given to the keepers of the escheats.

Chapter XXXIV.

1. Of the duty of the valuers, and how the advowson of a church ought to be valued.

But the duty of the valuers in valuing and appraising things of inheritance is that they should first see, what and how much there is in the demesne in each manor, that is, how many acres of arable land, how many rods, and how much an acre and a rod are worth by the year. Likewise how many acres there are in pasture and what each acre is worth by the year. Likewise what and how much is in fallow. Likewise how many acres there are of meadow, and in what year it may be mown and in what year not. Likewise how many acres of wood, and how much it is worth by the year with the beech-mast or not. Likewise let the gardens be valued. Likewise let the stews and fishponds, if there be any, be valued. f. 75 b. And in sum all the other things, which are of the substance of the manor, and from which gain may be made Likewise what and how much there is in villenage, and how many rods, and how much each rod is worth by the year in rents, taillages, and all other things. Afterwards let the services of the free men and their rents be valued. And if there be an advowson, then let the advowson be valued and appraised together with the other things, to wit, for every mark according to the value of the church let there be valued twelve pennies, as, for instance, if the church in each year according to a common valuation would be worth a hundred marks, let the advowson be valued at a hundred shillings. But when the valuation and appraisement have been made as aforesaid, they may

multis modis, q nō ritè fortè, quia ad minus vel plus appreciatæ sunt res hæreditariæ quàm valeant, ut cùm talis res non valeat nisi tantum, vel cum plus valeat quàm tantum, appreciata est ad tantum. Item causari poterit assignatio vel occasionari sicut appreciatio, s. cùm tale maneriū tantū valeat, extensores non assignaverunt tali, qui queritur, nisi tale q minimū est, & ideò si causatio justa fuerit, alia extensione, vel appreciatione, vel assignatione opus erit, secundùm q inferiùs pleniùs dicetur. Cùm autē extensio & appreciatio ritè facta fuerit, fiat rerum hæreditarum partitio æqualiť in duas partes vel plures, secundū numerū cohæredum participū, & ita q quælibet pars p oĩa æqualis sit alteri, & facta sic partitione, cuilibet cohæredū assigneť pars sua, non ut quilibet post aliū eligat partē suā, sed huj⁹ distributionis fortunā faciant judicē,[1] ut quilibet habeat partē illā, quæ p sortē ei acciderit. Ita q in plurib⁹ schedulis scribantur nomina cohæredū particularū; & nominata, & quasi ex improviso tradantur omnes schedulæ particularū alicui laico, qui omnino literas ignoret, & ipse tūc tradat cuilibet participi schedulā suā, & erit quilibet eorum cōtent⁹ de parte illa, quæ in schedula illa cōtinetur, velit nolit. Et hoc ita erit, nisi fortè de cōsēsu ita evenerit, q quilibet post aliù habeat electionē secūdùm ætatis prærogativā, s. primogenit⁹ primā, & postnat⁹ aliā, & sic deinceps. Et sive sic sive nō sic, statim irrotuletur quid, & cui, & ubi, & p quas particulas fuerit pars quælibet assignata, in ťris, & tenem̃tis, & feodis militū, & redditibus, & omnib⁹ aliis reb⁹ ad ppetuam memoriā. Itē & si

Cod. vi. Tit. xliii. § 3. Britton, l. iii. ch. vii. § 8. Fleta, 312.

Britton, *ib.*, § 10. Fleta, *ib.*

[1] The words of the rescript of the Emperor Justinian are "Sancimus "itaque in omnibus hujusmodi casibus rei judicem fortunam esse, "et sortem inter altercantes adhi-"bendam." Cod. vi. tit. xliii. § 3.

be found fault with and impugned in many ways, because they have not by chance been duly made, because the inheritable things have been valued at less or at more than they are worth, and when such a thing is only worth so much and when it is worth more than so much, it has been appraised at so much. Likewise the assignment may be found fault with or objected to, like the appraisement, to wit, when such a manor is worth so much, the valuers have assigned to such an one, who complains, only such a manor, which is too little, and therefore if the fault is found justly, there will be need of another valuation or appraisement or assignment according to what will be explained below. But when the valuation and appreciation have been duly made, let there be a partition of the inheritable things equally into two or more parts according to the number of co-heirs parceners, and so that each part shall be in all respects equal to the other part, and upon the partition being so made, let there be assigned to each co-heir his own part, not that each shall choose his part after another, but let them make fortune the judge, that each should have that part which falls to him by lot, so that the names of the particular co-heirs and the articles named be written on several schedules, and all of a sudden all the schedules of the particular person be handed to a layman, who does not know his letters, and let him then hand to each parcener his schedule, and each person shall be content with the part which is contained in the schedule, whether he is willing or unwilling. And this shall be so, unless by chance upon consent it has happened, that each has his choice after another according to the prerogative of age, that is, the first-born the first choice, and the after-born the next choice, and so in succession. And whether it be so or not, let it be entered in the roll forthwith what, and to whom, and where, and by what particulars each part has been assigned, in lands and tenements and military fiefs and rents, and all other things for a perpetual memorial.

aliqua ẗra sit, quæ post temp⁹ ad hæredes reverti debeat, sicut dos, vel alia quæcūq;, fiat irrotulatio, quid quis tollere debeat, & tunc statim capiantur homagia, cùm fuerint servitia atturnata.[1] Non autē veniunt in divisionē omnes res hæreditariæ, aliquando ꝑpt̄ privilegiū, ꝑpt̄ ꝑsonā cui cōpetit ratione ætatis, sicut ꝑpt̄ primogenituraⁿ & æsnetiaⁿ, secundùm quod inferiùs dicetur. Item ꝑpt̄ ipsam rem, quæ divisionem non recipit, cùm ꝑpter cōsensum cohæredum, qui desiderant, q aliqua res hæreditaria remaneat in cōmuni. Inprimis autē videndū est, quæ veniant in divisionem, & hoc viso, de facili ꝑpendi poterit, quæ nō veniāt. Et sciendū, q in divisionē veniunt tam dominica quàm villenagia, quæ dici possunt dominica; item veniunt servitia liberorum hominum, & homagia. Item veniunt in divisionē plura capitalia mesuagia, & unū, sive sint in diversis baroniis constituta, sive non. Non enim poterit aliquis particeps ratione primogenituræ & æsnetiæ sibi vendicare omnia capitalia mesuagia, habet tamen privilegium, propter æsnetiam, quod primam habebit electionem, ut, si plures participes sint ibi cohæredes, et plura capitalia mesuagia, primogenit⁹ primò eligat, et posteà postnatus, et sic tertius, et quartus in infinitum, quamdiu superfuerit unicum capitale mesuagiū. Sed si cùm plures ibi fuerint, non tamen tot, quòd quilibet habeat unum, tunc illis, qui expertes sunt, de cōmuni hæreditate satisfiat ad valentiam. Si autem plura ibi fuerint, postquā quilibet habet unum, tunc reincipiat primogenitus suam electionem, & sic postnatus, et quilibet post alium ut prædictum est, et sic pluries fiat electio, si mesuagia suffi-

Britton, l. iii. ch. viii. § 1. Fleta, 312.

f. 76.

Britton, *ib.*, § 3. Fleta, 313.

[1] "attornata," MS. Rawl.

Likewise, if there be any land which ought to return after a time to the heirs, such as dower land or any other, let there be an entry in the roll, what each person ought to take away, and then forthwith let the homage be taken, when the services are attourned. For all hereditary things do not come into division, sometimes by reason of a privilege, on account of the person who is entitled by reason of age, as on account of primogeniture or elder birth, according as will be explained below. Likewise on account of the thing itself, which does not admit of division, as well as on account of the consent of the co-heirs, who desire that an hereditary property should remain in common. But in the first place it is to be considered, what things come into division, and upon determining this, it will be more easy to decide, what do not. And it is to be known, that there come into division as well desmenes, as villein tenures, which may be called demesnes. Likewise there come into division the services of free men and their homages. Likewise there come into division several capital messuages and one, whether they are constituted in different baronies or not. For no parcener can by reason of primogeniture and seniority claim for himself all the capital messuages; he has, however, a privilege on account of f. 76. seniority, that he shall have the first choice, so that if there are several co-heirs there, and several capital messuages, the eldest born shall first choose and after him the next born, and so the third and the fourth without end, as long as there is a single capital messuage remaining. But if when there are several messuages, there are not, however, so many that each can have one, then let satisfaction be made to those who are without [a messuage], from the common inheritance up to its value. But if there be several, after each has one, then let the first born recommence his election, and so the next born, and any one after him as aforesaid, and so let a choice be made, several times, if the messuages

ciant, et si unus expers fuerit, tunc ꝑvideatur ei, ut suprà. Item facta electione, cùm quilibet habuerit unum, & unicum remanserit, illud inter partes dividatur, nisi consenserint quòd totum uni remaneat, ita quòd aliis satisfiat ꝑportionaliter in aliis ad valorem. Item cùm ibi fuerint plura capitalia mesuagia, non sunt tamen tempore assignationis deliberata, sunt enim quidā, qui de concessione antecessorum tenent ad vitam quacunq; ratione, sicut nomine dotis, vel hujusmodi, tunc primogenitus primò eligat ut priùs, vel mesuagium q deliberatum est, vel illud q non est deliberatum, & ei, qui tunc fuerit sine mesuagio, ad tempus assignetur aliquid ad valentiam loco mesuagii in tenantia, donec suum fuerit ei deliberatum. Si liber sockmannus[1] moriatur pluribus relictis hæredibus & participibus, si hæreditas partibilis sit et ab antiquo divisa, hæredes (quotquot erunt) habeant partes suas æquales, & si unicum fuerit mesuagium, illud integrè remaneat primogenito, ita tamen quòd alii habeant ad valentiam de communi. Si autem non fuerit hæreditas divisa ab antiquo, tunc tota remaneat primogenito. Si autem fuerit sockagium[2] villanū, tunc consuetudo loci erit observanda. Est enim consuetudo in quibusdam partibus, quòd postnat⁹ præfertur primogenito, & è contrario. Cùm autem liberum tenementum teneatur ꝑ servitium militare, & plures sint ibi cohæredes, et unum capitale mesuagium, inter cohæredes dividatur, secundùm q vallatur fossato, vel heya, secundùm q includitur cum gardinis vel vivariis; ita tamen, quòd facta partitione, primogenitus vel primogenita habeat electionem ꝑpt̄ suam æsnetiam. Dividitur enim quandoq;

[1] "sokemannus," MS. Rawl. | [2] "sokagium," MS. Rawl.

suffice, and if one is without a messuage, let him be provided for as above. Likewise on the choice having been made, when each of them has one, and there remains a single one, let it be divided into shares, unless they should agree that the whole should remain to one of them, so that the others shall be satisfied proportionally with other things up to its value. Likewise when there are several capital messuages, they are not, however, delivered at the time of the assignment, for there are some persons who under the grant of ancestors are tenants of them for life, as for instance, in the name of dowers or such like, then let the first born first choose as before either a messuage which is delivered, or a messuage which is not delivered, and to him who shall then be without a messuage, let there be assigned to him temporarily something equal to the value and, in place of the messuage, in tenancy, until his mansion shall have been delivered to him. If a free sockman dies leaving several heirs and parceners, if the inheritance is capable of partition and has been divided from ancient time, let the heirs (how many soever there may be) have their equal shares, and if there be a single messuage, let that remain in its entirety to the first born, so, however, that the others shall have an equivalent from the common property. But if it be not an inheritance divided from ancient time, then let the whole remain to the first born. But if it be a villein sockage, then the local custom will have to be observed. For it is the custom in some parts that the younger born is preferred to the elder born, and the contrary. But when a free tenement is held by military service, and there are several co-heirs, and one chief messuage, let it be divided amongst the co-heirs according as it is fenced by a ditch or a hedge, according as it is inclosed with gardens or stews, in such manner, however, that upon the partition being made, the eldest born son or daughter shall have his or her choice by right of seniority. For a hall is sometimes

Britton, l. iii. ch. viii. § 5. Fleta, 313.

aula in duas partes vel plures, quandoq; camera dividitur ab aula, et sic fiet de pluribus domibus in curia existentib⁹. Uxor autem post mortē viri sui in assignatione dotis, nihil capiat de capitali mesuagio cum hæredib⁹ plurib⁹ vel uno, ubi non fuerit nisi unū capitale mesuagiū, sed habebit electionem de uno mesuagio q tenetur in villenagio, si autem nullum tale fuerit, tunc assignetur ei loco curiæ ad valentiam tertiæ partis capitalis mesuagii, in latum & in lōgum, & ædificabitur de cōmuni, et hoc erit ubiq; ubi dotata fuerit de tertia parte, & si aliter fiat quādoq;, hoc nō erit de jure sed de gratia speciali, vel p ignorantiā. Nec etiā aliquid capiat de advocatione ecclesiarū ratione ttiæ partis suæ, nō magis quam de mesuagio; nisi fortè dotata fuerit de aliquo manerio integro cū ptiñ, nulla facta exceptione, nisi in cōstitutione dotis adjūcta fuerit specialit advocatio sua ttiæ parti. De hoc autē q dicit, q de feod' militari veniūt in divisionē capitalia

f. 76 b.

mesuagia, et int cohæredes dividuntur, hoc verum est, nisi capitale mesuagium illud sit caput comitatus, pt jus gladii, q dividi non potest, vel caput baroniæ, castrum, vel aliud ædificiū, & hoc ideò, ne sic caput p plures particulas dividatur, & plura jura com̃ & baroniarum deveniant ad nihilum, p q deficiat regnum; q ex comitatibus & baroniis dicitur esse constitutum. Si autem plura sint ædificia, quæ sunt capita baroniæ, dividi possunt inter cohæredes, facta electione, salvo jure æsnetiæ, qui cùm plura sint ibi jura, quodlibet per se poterit integrè observari: quod quidem non est in uno, ut prædictum est, licèt à quibusdam dicatur,

divided into two or more parts, and sometimes a chamber is divided from the hall, and so it shall be of several dwellings existing in the court. But the wife after the death of her husband in the assignment of her dower should take nothing of the chief messuage with one or several heirs, where there has been only one chief messuage, but she shall have her choice of one messuage which is held in villenage; but if there be no such messuage, then let there be assigned to her in the place of the court, as much as the value of a third part of the chief messuage, in width and in length, and a house shall be built there at the common expense, and this shall be everywhere, where she is endowed with a third part, and if it be otherwise anywhere, this will not be of right, but of special grace or through ignorance. Nor shall she take any part of the advowson of churches by reason of her third part, no more than of the messuage, unless by chance she has been endowed with an entire manor with its appurtenances, no exception having been made unless in the appointment of the dower, her advowson has been specially added to her third part. But concerning this which is said, that in the case of a military fief the chief messuages come into division and are divided between the co-heirs, this is true, unless that chief messuage be the capital mansion of a county, on account of the right of the sword, which cannot be divided, or the capital mansion of a barony, a castle, or other edifice, and this for this reason, lest the capital mansion should be thus divided into several shares, and the severed rights of counties and of baronies should be diminished to nothing, whereby the realm would fail, which is said to be made up of counties and baronies; but if there are several edifices which are capital mansions of baronies, they may be divided amongst the co-heirs, a choice being made by them, reserving the right of seniority, for, since there are several rights there, each may be maintained in its activity, which is not [possible] in one, as aforesaid, f. 76.

quòd in aliis regionibus aliquando de cõsuetudine dividatur. Sed quòd nunquã dividi debeat in Anglia videtur, nec visum fuit contrarium, & erit cõsuetudo regionis observanda,[1] ubi hæreditas est, quæ petitur, & ꝑsonæ nascuntur, quæ petunt, et unde si dicatur, quòd in regno Angliæ aliquando facta fuit partitio, hoc fuit injustum. Si autem non sit ibi ubi unicum[2] castrum, illud integrè remaneat primogenito, ita tamen, quòd postnato ꝑ parte sua satisfiat[3] alibi ad valentiam, uni vel pluribus, secundùm numerum personarum. Si autem plura, primogenit⁹ habeat electionem, sicut de capitalib⁹ mesuagiis. Item veniunt jura in divisionem, unum vel plura, sed tamen non dividuntur, quia divisionem non recipiunt, sicut [sunt advocationes ecclesiarum, & servitutes prædiorum, plures enim advocationes dividi possunt inť plures cohæredes, & quodlibet jus poterit esse integrum & ꝑ se, quia sunt ibi plura jura & diversa. Unica autẽ advocatio dividi non poterit, quãvis ecclesia, quæ est quasi subjectum, in plures partes dividatur, duas, tres, vel quatuor, ratione diversarum baroniarum, et hoc (ut prædictũ est) ab antiquo. Et unde, cùm unica sit advocatio & unicũ jus, et plures cohæredes quasi unum corp⁹, ꝑpť unitatẽ juris, q̃ habẽt, aut omnes simul præsentent, aut null⁹, nec potest aliquis eorum alteri p̃ferri ratione æsnetiæ, nisi ita inť eos convenerit ab initio, q̃ quilibet post alium p̃sentet successivè. Itẽ nec p̃fertur numer⁹, ut si plures cõsentiãt, dum tamẽ sit unic⁹, qui reclamat.[4] Et quo casu, nisi infra sex mẽses cõvenerint, ordinarius loci ꝑvidebit ecclesiæ viduitati. Item si servitutes à fundo, qui

Britton, l. iii. ch. viii. § 2. Fleta. 313.

Britton, l. iii. ch. viii. § 5. Fleta, 313.

[1] "sed quod dividi non debeat, "nunquam in Anglia visum fuit "contrarium, et erit consuetudo regionis observanda," MS. Rawl.

[2] "ibi nisi unicum," MS. Rawl.

[3] "satisfaciat," MS. Rawl.

[4] "reclamet," MS. Rawl.

although bysome it is said, that in other countries it is sometimes divided by custom. But in England it appears that it ought never to be divided, nor has the contrary ever been seen, and the custom of the country will have to be observed, where the inheritance is, which is claimed, and where the persons who are claimants are born; and hence, if it be said that in the realm of England a partition has been sometimes made, this was unjust. But if there be there only a single castle that should remain entire to the eldest born, in such manner, however, that satisfaction should be made to the younger born sons elsewhere to the value of their shares, one or more, as the case may be, according to the number of persons. But if there be several castles, let the first born have his choice as of the chief messuages. Likewise rights come into division, one or more, but nevertheless they are not divided, because they do not admit of division, such as the advowsons of churches and predial servitudes, for several advowsons may be divided amongst several co-heirs, and each right may be entire and separate because there are there several and different rights. But a single advowson cannot be divided, although the church which is as it were the subject may be divided into several parts, two, three, or four, by reason of different baronies, and this as aforesaid from ancient time. And hence since the advowson is single, and the right is single, and the several co-heirs are as it were one body on account of the unity of right, which they have, either all of them should present together, or none of them, nor can any one of them be preferred to another by reason of seniority, unless it has been agreed so amongst them from the commencement, that each of them shall present successively. Likewise number does not prevail, as for instance if several consent, provided there is a single one who reclaims. And in which case, unless they agree within six months, the ordinary of the place shall provide for the vacancy of the church. Likewise if servitudes

dividitur, fundo vicino debeantur, partitio facta servitutē debitā minuere non debet, nec mutare. Si autem servit^{9} debeatur à fundo vicino fundo qui dividitur, una erit servit^{9}, quātum ad fundum cui debetur [1] ꝑpter plures particulas, & plura erunt ibi jura integra, & quilibet uti possit ꝑ se, simul vel successivè, dum tamen modū debitum nō excedat, q̄ fund^{9} vicin^{9}, in quo cōstituta est servit^{9}, plus debito nō oneratur. Sunt etiā aliæ res hæreditariæ, quæ veniunt in partitionē, quæ cùm cōmodè dividi nō possunt, cōcedūtur uni, ita q̄ alii cohæredes alibi de cōmuni hæreditate habeant ad valorē; sicut sunt vivaria, piscariæ, parci, & hujusmodi; vel saltem q̄ partē habeāt ꝑ defectu, sicut secundū piscē, tertiū, vel quartū; vel secundū tractum, tertiū vel quartum, secundùm numerū cohæredū. Itē de parcis, secundā, tertiā, vel quartā bestiā. Item cadit in partem, terra priùs data in maritagiū alicui sororū & cohæredū, nec est t̄ra sic data prædeducenda, quia aut maritagiū cōferat, aut recedat sine parte. Sed quid si maritagiū excedat partē illā, quā habitura esset de cōmuni hæreditate? si maritag' cōtribuerit, nūquid poterit ad hoc cōpelli? nō. Habet enī electionem conferendi, vel non. Et sic cadit generaliter in partem, id q̄ datur alicui mulieri cohæredi & participi in maritagium de communi hæreditate patris vel matris, q̄ dividi debet inter cohæredes, & hoc sive sit hæreditas descendens, sive ꝑquisitū, ex quo ꝑquisitū, sicut hæreditas, descēdit ad hæredes. Et q̄ maritagiū

Britton, l. iii. ch. viii. § 7. Fleta, 314.

f. 77. Britton, *ib.*, § 8. Fleta, 314.

[1] "ad fundum qui debet servitutem, plures vero erunt servitutes, quantum ad fundum, cui debitur," MS. Rawl.

from an estate, which is divided, are due to an adjoining estate, the making of a partition ought not to impair, nor to change the servitude due from it. But if a servitude is due to an estate, which is divided from an adjoining estate, the servitude shall be one, as far as regards the estate to which it is due on account of the several portions of it, and there shall be there several entire rights, and each may use his own by himself, at the same time or successively, provided he does not exceed the due quantity, so that the adjoining estate, in which the servitude is established, is not burdened unduly. There are also other inheritable things, which come into partition, which, since they cannot be conveniently divided, are conceded to one on condition, that two other co-heirs have from the common inheritance an equivalent elsewhere; such as stews, fish-ponds, parks, and such like; or at least that they have a share to make good the deficiency, as, for instance, the second fish, or the third, or the fourth; or the second draught, or the third, or the fourth, according to the number of co-heirs. Likewise from parks, the second, third, or fourth beast. Likewise there falls into partition the land previously given in maritage to one of the sisters and co-heirs, nor is land so given to be previously deducted, because she must either contribute her maritage or go away without a share. But what if the maritage exceeds the part, which she is about to have of the common inheritance? If she has contributed f. 77. her maritage, can she be compelled thereto? No, for she has the choice of contributing or not. And thus whatever is given to a woman, who is a co-heiress and parcener, by way of marriage portion from the common inheritance of the father and mother, which ought to be divided amongst the co-heirs, is reckoned generally to her share, and this whether it be a descending inheritance or an acquired property, since an acquired property, as an inheritance, descends equally to heirs. And that the

cadit in partē habetis in rotulo de primis placitis post guerrā cōmunē[1] Essex, de H. de Abecot & particip^{o} suis p breve, q dicitur nuper obiit de proparte sororum. Et quid si vir dederit uni ex filiabus suis in legittima viduitate sua totum maritagium suum? adhuc erit illud idem dicendum, quod priùs. Item si pater vel mater, vel uterq, totā hæreditatem suam dederit in maritagium, non cadit aliquid in partem, quia nihil remanet inter cohæredes dividendum. Si autem, cum homagium intervenerit, post tertium hæredem vel antè fiat partitio, adhuc cadit maritagium in partem, ut priùs, quòd computato ei, qui tenet, maritagio suo, propter homagium perficiatur ei, quod defuerit de communi hæreditate. Sed quid, si pater vel mater aliquem ex cohæredibus purè feoffaverit, p homagio & servitio, nulla facta mentione de maritagio? quæritur an feoffamentū veniat in divisionem, sicut maritagium, & quicquid ab aliis dicatur, videtur quòd non, quia cum dicatur quòd maritagium cadit in partem, adeò de facili dici poterit, quòd feoffamentum caderet; quod est inauditum. Et quòd maritagium cadere debeat & non feoffamentū, videtur prima facie, quia maritagium reverti possit & remanere cum feoffatore, vel ejus hæredibus, & partiri inter cohæredes, ex quo homagium non intervenerit; quod quidē non est de puro feoffamento propter homagium, quia sic essēt quasi dominus vel domini & hæredes; nisi sic fiat (ut p̃dictum est) quòd feoffamentum computetur feoffato in parte sua. Sed quid si particeps feoffatus sit pro servitio tantùm sine homagio? vel pro homagio & servitio tenend' de capitali domino? Item si fiat donatio viro

Britton, l. iii. ch. viii. § 8. Fleta, 314.

[1] It appears that the word "communem," which has much perplexed many commentators, is an erroneous extension of the contraction "com." Thus, "post guerram com. "Essex" is the reading of MS. Rawl., fol. 42, "com." being the usual contraction for "comitatu." The war in question between Henry III. and Louis IX. of France came to an end on Sept. 11, 1217, six weeks before the conclusion of 1 Henry III. This is the earliest case cited in Bracton's work.

maritage is reckoned to her share, you have in the Roll of the first pleas after the war in the county of Essex, concerning Henry of Abecot and his parceners, by the writ which is called "Nuper obiit de proparte sororum." And what if a man has given to one of his daughters, in her legitimate widowhood, all her maritage? The same thing will have to be said as before. Likewise if a father or mother, or both, have given their entire inheritance as a maritage, nothing comes into partition, because nothing remains to be divided amongst co-heirs. But if, when homage has intervened after the third heir or before the partition is made, the maritage still comes into partition, as before, because his maritage being reckoned to him who holds it, there is made good to him on account of the homage what is wanting from the common inheritance. But what if the father or mother has absolutely enfeoffed one of the co-heirs in return for homage and service, no mention having been made of a maritage? It is asked whether the feoffment comes into division just as a maritage, and whatever may be said by others, it appears not, because when it is said that a maritage comes into partition, it may be as easily said that a feoffment comes into partition, which is unheard of. And it appears at first that a maritage ought to come into partition, and not a feoffment, because a maritage may revert and remain with the feoffor or his heirs, and may be partitioned amongst co-heirs, since homage will not have intervened; which is not the case with an absolute feoffment on account of the homage, for there would thus be as it were a lord or lords and heirs; unless it be done as above said, namely, that the feoffment be reckoned to the feoffee as his share. But what if the parcener has been enfeoffed for service only without homage? or for homage and service to hold of the chief lord? Likewise, if a donation be made to a man and his wife together in

& uxori simul in maritagium, adhuc erit q̃ maritagium cadit in partem. Item si fiat viro sine uxore pura donatio pro homagio & servitio, sibi & hæredibus suis, tale feoffamentum non cadit in partem, quamvis terra descendat hæredibus uxoris. Et idem erit si fiat pura donatio extraneæ personæ, qui post feoffamentum unam ex filiabus & participibus duxerit in uxorem. Dictum est, quòd æsnetia semper præferenda est propter privilegium ætatis, sed esto quòd filia primogenita, relicto hærede, nepote vel nepte, in vita patris vel matris, à quibus hæreditas descendit decesserit, p̃ferēda erit soror antenata nepoti vel nepti ex filia primogenita, quantum ad æsnetiam, quia mortem parent̃ expectavit. Sed quid dicetur de serjantia? videtur, q̃ dividi non debeat, ne cogatur rex servitiū suū recipere p̃ particulas. Facta ut p̃dict' est partitione & p̃ sortē assignatione, adita hæreditate oñia jura hæreditaria transeunt ad hæredes ex civili aditione. Possessio tamen nisi naturaliter fuerit ap̃phensa, videlicet animo & corpore, p̃prio vel alieno, sicut p̃creatorio,[1] priùs ad ipsos non p̃tinebit, & unde cùm in curia domini regis facta fuerit partitio, statī habeant breve de seysina sua habenda, secund' q̃ partitio facta fuerit
f. 77 b. inter eos in curia domini regis p̃ tale breve.

2. Breve vicecomiti de seysina facienda co-hæredibus post partitionem.

Rex vic. salutē. Scias q̃ cū extentio & ap̃ciatio oñium terraꝝ & tenem̃toꝝ q̃ fuerunt talis, patris vel matris talium, facta inter eas partitione, tali p̃genitæ accederunt p̃ sortem, talia maneria q̃ sunt capita baroniæ, p̃pter æsnetiam, & talia mesuagia per electionem,

[1] "procuratorio," MS. Rawl.

maritage, it will still happen that the maritage comes into partition. Likewise, if an absolute donation be made to a man without his wife for homage and service, to himself and his heirs, such a feoffment is not reckoned to a share, although the land descends to the heirs of the wife. And the same thing will happen, if an absolute gift be made to a stranger, who after the feoffment has taken one of the daughters and parceners to wife. It has been said, that an option is always to be preferred on account of the privilege of seniority; but let it be that a first-born daughter has died, leaving an heir, a grandson or granddaughter, during the lifetime of her father or the mother from whom the inheritance descends, an elder born sister will have to be preferred to the grandson or granddaughter by the first-born daughter, as far as regards seniority, because she has waited for the death of her parents. But what shall we say of serjeancy? It seems that it cannot be divided, lest the king should be obliged to take his services in morsels. The partition having been made as aforesaid, and the assignment by lot, and the acceptance of her inheritance, all the inheritable rights are transferred to the heirs upon the civil acceptance. The possession, however, unless it has been naturally acquired, that is with the mind and the body, in one's own person or by another person, as for instance by an authorised agent, will not previously appertain to them, and even when a partition shall have been made in the king's court, they have forthwith a writ for having their seysine, according as the partition has been made between them in the court of the lord the king by such a writ. f. 77 b.

2. A writ to the sheriff to give seysine to co-heirs after partition.

The king to the sheriff greeting: Know you that since a valuation and appraisement have taken place of the lands and the tenements, which belonged to such an one, the father or mother of such persons, such a partition having been made between them, there have devolved to the first-born by lot such manors which are capitals of baronies, on account of seniority, and such messuages

tot terræ & tot tenementa, tot advocationes, & tot feoda militum, & similiter tali talis pars, & sic de aliis. Et ideò tibi præcipimus, quòd prædictis talib⁹ de p̃dictis terris & tenementis & feodis, & secund' q̃ p̃dictū est, sine dilatione plenariā seysinam habere facias. Teste, &c. Cùm autem un⁹ ex pluribus cohæredibus & participib⁹ sine hærede de corpore suo moriatur facta partitione, ejus portio accrescet superstitibus per jus accrescendi.

Cap. XXXV.

1. De homagiis faciendis et capiendis.

Cum autē quis post mortē antecessoris, à capitali dño recognitus fuerit ad hæredē, ante assignationē vel post, sive hæres plenæ ætatis extiterit sive non, statim ab initio capitalis dñs capiat homag' suum, antequam habeat custodiā vel releviū. Sunt enim quidā hæredes, qui tenent ad homagiū faciendum, & ad sacramentum fidelitatis, quidam tantùm ad sacramentū fidelitatis, secundùm diversitatem tenementorum. Oportet igitur, quòd distinguantur genera tenementorum, ut per hoc sciri possit diversitas tenentium & hæredum. Tenementorum autem aliud tenetur per servitium militare, aliud per serjantiam, de quibus homagium faciendum erit domino capitali, propter servitium forinsecum, q̃ dicitur regale, & q̃ p̃tinet ad scutum & militiam, ad patriæ defensionem. Est etiam aliud genus tenementi ejus, sc. quod tenetur in socagio[1] libero, & ubi fit servitium in denariis capitalibus dominis, & nihil inde omnino datur ad scutum & servitium regis. Et dici poterit sockagium[2] a socko, & inde tenentes, qui tenent sockagio,[3] sockemanni[4] dici poterunt, eò quòd deputati sunt, ut videtur, tantummodò ad culturam, & quorum custodia & maritagium ad propinquiores parentes, jure sanguinis pertinebit. Et si aliquando inde de facto

Britton, l. iii. ch. iv. § 5.
Fleta, 204.

[1] "sokagio," MS. Rawl.
[2] "sokagium," id.
[3] "sokagio," id.
[4] "sokemanni," id.

by choice, so many lands, and so many tenements, so many advowsons, and so many military fiefs, and in like manner to such an one such a share, and so respecting the others, and accordingly we enjoin you that you cause such persons aforesaid to have plenary seysine without delay of the said lands and tenements and fiefs as above said. Witness, &c. But when one of several co-heirs and coparceners dies without an heir of his body after a partition has been made, his portion devolves to the survivors by accretion.

Chapter XXXV.

1. Of doing and of receiving homage.

But whenever any one after the death of an ancestor has been recognised by the chief lord as heir, before assignment or after, whether the heir be of full age or not, the chief lord should forthwith receive from the beginning his homage, before he has the custody or a relief. But there are some heirs, who are bound to do homage and take an oath of fealty, others only to take an oath of fealty according to the diversity of the tenements. It is necessary therefore to distinguish between the kind of tenements, that thereby the diversity of tenants and of heirs may be known. But some tenements are held by military service, others by serjeancy, for which homage is to be done to the chief lord, on account of foreign service, which is called regal, and which pertains to the shield and to warfare for the defence of the country. There is also another kind of tenement, to wit, what is held in free sockage, and where there is a service in money to the chief lords, and nothing is thence given to the shield and to the king's service. And it may be called sockage from sock, and hence those tenants who hold in sockage may be called sockmen from the fact that they are deputed, as it seems, only for the cultivation, and whose custody and maritage will pertain to their next parents by right of blood. And if sometimes

capiatur homagiū, quod pluries contingit, non tamen ꝑpter hoc habebit dominus capitalis custodiā & maritagium, quia non semper sequitur homagium, licèt quandoque. Est enim aliud genus sockagii,[1] quod dici-
f. 78. tur sockagium villanum, ubi nullum om̄ino cōpetit homagium, sed fidelitatis sacramenť, sicut de villano, q̄ si de facto fecerit ꝑ negligentiam vel stultitiam dominoř, hoc erit ipsis dominis p̄judicium, & ideò inde cavendum. Est etiam aliud genus tenementi, q̄ datur in maritagium, & ubi non fit homagium ante tempus, sc. ante tertium hæredem inclusivè positum, ꝑpter commodum donatoris per reversionem, q̄ si de facto priùs fiat, tenet, quamvis hoc sit ad damnum donatoris. Et ut videtur, datur tempus usq̄ ad tertium hæredem & non ultrà, quia cùm sint hæredes tres de hærede in hæredem, extunc vix poterunt deficere, & ideò tunc sequitur homagium absq̄ damno & periculo donatoris. Item non capitur homagium ante tempus ꝑpter jus accrescendi, ut si hereditas priùs descendat cohæredibus, fratribus vel sororibus, nullus eorū homagium faciet fratri vel sorori antenatis, quia si aliquis ex pluribus cohæredibus sine hærede de suo corpore decedat, pars descendentis accrescet superstitibus, & cum illis remanebit, si homagium non intervenerit, quod si fecerit, de manibus cohæredum descendet ad hæredes inferiores. Cùm autem plures fuerint cohæredes, ut prædictum est, omnes accapitabunt filiæ primogenitæ, & maritus primogenitæ homagium faciet capitali domino de toto feodo, & postnatæ primogenitæ vel ejus marito sacramentum facient fidelitatis, & totum servitium suum, & primogenita vel ejus maritus inde capitali dño respondebit, ne capitalis dñs cogatur recipere servitia sua per

[1] "sokagii," MS. Rawl.

homage is received from them as a matter of fact, which occasionally happens, the chief lord will not have on that account the custody and the maritage, because homage does not always follow, although sometimes. There is likewise another kind of sockage, which is called villein sockage, where no homage at all ought to be taken, but f. 78. an oath of fealty, as from a villein, who if he shall have done homage through the negligence and folly of the lords, this will be to the prejudice of the lords themselves, and therefore they must beware. There is likewise another kind of tenement, which is given in maritage, and where homage is not done before a certain time, as before the third heir counted inclusively, for the advantage of the donor by reversion, which if it be done sooner, he becomes tenant, although this is to the damage of the donor. And as it appears, time is allowed down to the third heir, and no further, because when there are three heirs from heir to heir, they can scarcely fail, and accordingly there then follows homage without loss or danger to the donor. Likewise homage is received before the time on account of the right of accretion, as if the inheritance should previously descend to co-heirs, brothers or sisters, none of them shall do homage to an elder-born brother or sister, because if any out of several co-heirs dies without an heir of his own body, the share of the descendant shall accrue to the survivors and shall remain with them, if homage has not intervened, but if he has done homage, it shall descend from the hands of the co-heirs to the lower heirs. But when there are several [female] co-heirs, as aforesaid, they shall all recognise the headship of the first-born daughter, and the husband of the first-born daughter shall do homage to the chief lord for the whole fief, and the after-born daughters shall take an oath of fealty to the first-born or to her husband, and [do] all their service, and the first-born daughter or her husband shall answer on that account, lest the chief lord should be obliged to receive their services in morsels,

Britton, l. iii. ch. iv. § 7. Fleta, 205.

particulas; particularis enim solutio non minimum habet incommodi. Habet etiam dominus capitalis custodiam, & maritagium postnatarum, & nō primogenita, nec ejus maritus, ut ovis à luporum morsibus eruatur, ꝑpter spem & eventum successionis, quod evenire posset, si infra ætatem morerentur ex aliqua machinatione, & hæc vera sunt, si plures sorores de alio tenuerint quàm de domino rege, quia si fortè de domino rege tenuerint in capite, tunc primogenita omissa omnes accapitabunt & homagium facient domino regi, & cùm de alio tenere debeant quàm de domino rege, & quælibet per se de facto accapitaverit capitali domino, hoc revocari non poterit à primogenita & ejus marito, sed semper quod factum est tenebit, quia capitalis dominus, quod ei oblatum est, non recusabit, sed sive tenuerit de domino rege sive de alio, cùm homagium factum fuerit, sive ante tertium hæredem vel post, statim sequentur relevia & alia servitia. Videndum est inter cætera, quid sit homagium, qualiter contrahatur, quis teneatur homagium capere, & quis homagium facere, cùm, quando, & quotiens, & de quibus rebus. Item per quas personas. Item qualiter capiatur, & per quæ verba, & per quæ verba fieri debeat sacramentum fidelitatis. Item qualiter, & per quantum tempus teneat homagium inter dominum & tenentem, & cùm ambo moriantur, vel unus ipsorum, & cadat ex utraque parte vel alia, & dissolvatur per mortem, teneat obligatio, & relevetur tenementum cum homagio in personis hæredum. Item cùm semel factum fuerit homagium, qualiter dissolvatur, & omnino extinguatur propter defectum vel propter delictum, domini vel tenentis, domini, quando dominium amiserit, quòd do-
f. 78 b. minus esse non potest; tenentis, q̄ tenementum reverti debeat ad dominum, secundùm quod tenens id tenuerit in dominicò vel servitio. Item si dominus possit

for a payment of them in morsels has considerable inconvenience. The chief lord has also the custody and the maritage of the after-born, and not the eldest born, nor her husband, that the sheep may be rescued from the bite of the wolves, on account of the hope and event of the succession, which might happen if they should die below age from any machination, and these things are true, if several sisters hold from another person than the lord the king, because if by chance they have held of the lord the king in chief, then, the eldest born being omitted, they shall all recognise the headship and do homage to the lord the king, and when they ought to hold of another than the lord the king, and each by herself has recognised in fact the headship of the chief lord, this cannot be revoked by the first born and her husband, but what has been done will always hold good, because the chief lord will not refuse what is offered to him; but whether she holds of the lord the king or of another, when homage has been done, whether before the third heir or after, there will immediately follow reliefs and other services. We must consider therefore amongst other things what is homage, how it is contracted, who is bound to take homage, and who to do homage, when, at what time, and how often and for what things. Likewise through what persons. Likewise in what manner it is taken, and by what words, and by what words the oath of fealty ought to be made. Likewise in what manner and for what time homage holds between the lord and the tenants, and when both die, or one of them, and it falls on one part or on both, and is dissolved by death, the obligation holds and the tenement is relieved with homage in the persons of the heirs. Likewise when once homage has been done, how it is dissolved and is altogether extinguished on account of the defect or the debit of the lord or of the tenant, of the lord when he has lost the lordship, because he cannot be lord; of the f. 78 b.
tenant, because the tenement ought to return, according as the tenant has held it in demense or in service. Like-

attornare homagium & servitium, vel istorum unum, contra voluntatem sui tenentis. Item si dominus homagium tenentis sui recusaverit, vel cùm homagium receperit, tenentem suum de servitio versus suum dominum superiorem non acquietaverit, sed propriæ bursæ totum infuderit, quid juris ?

2. Quid sit homagium, et qualiter contrahatur.

Britton, l. iii. ch. iv. § 1.

Fleta, 205.

Quid sit homagium ? Sciendum, quòd homagium est juris vinculum, quo quis tenetur & astringitur ad warrantizandum, defendendum, & acquietandum tenentem suum in seysina sua versus omnes, per certum servitium in donatione nominatum & expressum, & etiā vice versa, quo tenens reobligatur & astringitur ad fidem domino suo servandam, & servitium debitum faciendum. Item contrahitur homagium de utriusque voluntate, tam domini quàm tenentis, & per contrariam utriusque voluntatem dissolvitur si uterque voluerit, quia nihil tam conveniens est naturali æquitati, quàm unumquodque dissolvi eo ligamine quo ligatum est. Non enim sufficit, si unus tantùm hoc voluerit, quia nihil tam conveniens est naturali æquitati, &c. Est itaque tanta & talis connexio per homagium inter dominum & tenentem suum, quòd tantum debet dominus tenenti, quantum tenens domino, præter solam reverentiam.

3. Quis teneatur homagium capere.

Item quis teneatur homagium capere ? & sciendum, quòd dominus feodi, & feoffator, sive masculus sit, sive fœmina, major vel minor. Nec si, dum minor fuerit, homagium ceperit, major factus allegare potuit ætatem, & quòd deceptus fuit quando infra ætatem homagium cepit, quia in captione homagii semper subintelligendum erit, quòd hoc fit salvo jure cujuslibet, & inde si falsa charta intervenerit, cùm minor ad ætatem pervenerit, argui poterit falsitatis, non obstante homagio. Sed si contra actionem excipiatur de homagio, contra

wise if the lord may attourn the homage, and the service, or one of them, against the will of the tenant. Likewise, if the lord has refused the homage of his tenant, or when he has received his homage, he has not acquitted his tenant of his service towards his superior lord, but he has put the whole into his own purse, what is the law?

2. What is homage and how it is contracted.

What is homage? And it is to be known, that homage is a bond of law, by which a person is held and is bound to warrant, to defend, and to acquit his tenant in his seysine against all persons for a certain service named and expressed in the donation, and also conversely, by which the tenant is in return obliged and bound to keep faith to his lord and to do him due service. Likewise homage is contracted with the goodwill of each, of the lord as well as of the tenant, and it is dissolved with the contrary will of each, if each wishes, for nothing is so agreeable to natural equity, than that every thing should be released from the bond with which it is bound. For it is not sufficient if one only wishes it, for nothing is so agreeable to natural equity, &c. The connection, therefore, between the lord and his tenant by homage is so great and of such quality that the lord owes to the tenant as much as the tenant owes to the lord, except as regards reverence alone.

3. Who is bound to receive homage.

Likewise who should be bound to receive homage? And it is to be known, that the lord of a fief and the feoffor, whether male or female, major or minor [is bound to receive homage]. Nor if he has taken homage, when he was a minor, can he allege his age, and that he was deceived when he took homage under age, because in the taking of homage it is always supposed to be understood that this is done saving the right of each, and hence, if a false charter has been introduced, when the minor has come of age, it can be impugned for falseness, notwithstanding the homage. But if an exception to the action be raised on account of the homage, a

homagium replicetur de minori ætate, quod quidem esse non poterit in majore, qui ignorare non debet, cujus conditionis sit ille, cujus homagium ceperit.

4. Quis teneatur homagium facere.

Britton, l. iii. ch. ii. § 9. Fleta, 205.

Item videndum, quis potest homagium facere? Et sciendum, quòd liber homo, tam masculus quam fœmina, clericus & laicus, major & minor, dum tamen electi in episcopos post consecrationem homagium non faciant, quicquid fecerint ante, sed tantùm fidelitatem. Conventus autem homagium non faciet de jure, sicut nec abbas, nec prior, eò quòd tenent nomine alieno, scilicet nomine ecclesiarum, sicut videri poterit in ipsa donatione, in principio donationis, ut si dicatur. Sciant, &c. quòd dedi, &c. tali ecclesiæ & tali rectori vel tali priori, vel abbati & monachis ibidem Deo servientibus. Videtur & verum est, quòd primò & principalitèr fit donatio ecclesiæ, & secundariò rectoribus & personis, & unde si aliquando fiat homagium de facto in ipsa prima donatione, quod sæpiùs fit propter warrantiam, nunquam posteà sequetur relevium, vel aliud homagium, vel custodia de jure, licèt aliud de consuetudine, vel per modum donationis observetur. Quia si plures sint ibi abbates vel priores successivè, & mutentur omnes canonici in alias personas & alia capita, semper erit corpus idem, & idem conventus, ad
f. 79. similitudinem gregis, &c. Item si plures sint abbates, & priores successivè, nullus debet variari descensus juris de abbate in abbatem, sicut de hærede in hæredem, quia jure hæreditario nullus succedit alteri, quia sunt in possessione nomine alieno. Ei licèt tales ad homagium non teneantur de jure, faciunt tamen tota

replication against the homage can be made on account of the minority, which could not be done in the case of a person of full age, who ought not to be ignorant of what condition the person is, whose homage he has received.

4. Who is bound to do homage.

Likewise we must consider who can do homage. And it is to be known, that a free man, a male as well as a female, a clerk as well as a layman, a major as well as a minor [may do homage] provided, however, that if they are elected to be bishops, they do not do homage after their consecration, whatever they may have done before it, but only fealty. A convent also will not do homage of right, as neither an abbot nor a prior, for this reason, that they hold in another name than their own, to wit, the name of their churches, as may be seen in the donation itself, at the commencement of the deed, as if it be said: Know all men, &c. that I have given, &c. to such a church, and to such a rector, or such a prior, or to the abbot and monks there serving God. It appears, and it is true, that the donation is made firstly and principally to the church, and secondarily to the rectors and the parsons, and hence if sometimes homage is in fact done on occasion of the very first donation, which is repeatedly done for the sake of the warranty, a relief or second homage or custody of right will never follow, although it may be otherwise observed from custom or through the mode of donation. For if there be several abbots or priors there successively, and all the canons are changed into other parsons and other heads, there will always be the same body and the same convent after the likeness of a flock, &c. Likewise if there are f. 79. several abbots and priors successively, there ought to be no variation in the descent of right from abbot to abbot, as from heir to heir, because no one succeeds the other by hereditary right, because they are in possession in another name than their own. And although such persons are not bound to do homage of right, they do it

Britton, l. iii. ch. iv. § 9. Fleta, 207.

die de consuetudine, & dant relevia infra certa tempora scilicet infra tricesimum annum, sicut in Normannia de consuetudine observatur, ne capitales domini de debitis servitiis defraudentur, hoc tamen inter premissa observato, quòd si minor homagium fecerit, nullum tamen juramentum fidelitatis, antequam ad ætatem pervenerit, præstabit. Et qualiter poterit minor homagium facere vel capere, cùm necessarius sit huic inde consensus & expressio verborum.

5. Item quando, et quotiens homagium faciet.

Item qũando quis possit homagium facere? Et sciendum, quòd in principio donationis, tam ante seysinam habitam quā post seysinam, sed si ante & seysina non sequatur, homagium effectum non habebit, vel si nec in vita donatoris, nisi donatio ratificata fuerit, per confirmationem ab hærede. Item quotiens fiet? Et sciendum, quod semel ab initio. Et pluries successivè capi poterit homagium, sicut fieri; quia cùm ab initio factum fuerit homagium à tenente, & captum à domino, semper tenet homagium, quousque uterque simul, vel alter eorum moriatur, & tunc per mortem decedentis solvitur sive dissolvitur, quia mors omnia solvit ex parte decedentis, sive dominus sive tenens fuerit. Sed tenet homagium in persona superstitis, & si cadit in persona morientis, tenet tamen obligatio in persona hæredis, & in ejus persona cum homagio relevatur tenementum, & in persona domini innovatur homagium, quod tenuit ab initio. Et unde, si plura fiant homagia ab hæredibus pluribus successivè, plura erunt ibi homagia, ratione plurium hæredum, & per hoc plura relevia, & ratione unius domini, qui pluries homagia

every day from custom, and give reliefs within certain times, to wit, within the thirtieth year, as is observed by custom in Normandy,[1] lest the chief lords should be defrauded of the services due to them; this, however, may be observed amongst the premises, that if a minor has done homage he shall make no oath of fealty, until he has come of age. And in what way a minor may do or receive homage, since consent and the expression of words is necessary on one side and on the other.

5. Likewise when and how often he does homage.

Likewise when may a person do homage? And it is to be known that [it may be done] at the commencement of a donation as well before seysine, as after seysine has been had, but if before, and seysine does not follow, the homage will not have effect, or if not in the lifetime of the donor, unless the gift has been ratified by confirmation on the part of the heir. Likewise how often shall it be done? And it is to be known that [it should be done] once from the commencement. And homage may be taken, as it may be done, repeatedly in succession, because when from the commencement homage has been done by the tenant and taken by the lord, the homage is always binding, until both together or one of them dies, and then it is released or dissolved by the death of the departed one, for death releases all things on the part of the deceased, whether he be lord or tenant. But homage is binding on the person of the survivor, and if it expires in the person of the deceased, nevertheless the obligation is binding in the person of the heir, and the tenement is relieved in his person with the homage, and the homage, which was binding from the commencement, is renewed in the person of the lord. And hence if several homages are done by several heirs in succession, there will be more homages there by reason of several heirs and accordingly more reliefs, and by reason of there

[1] The custom of Normandy in this identical respect is cited by Britton, l. iii. ch. iv. § 9.

ceperit, non erunt ibi plura homagia sed unum, licèt pluries innovetur; vice versa, cùm tenens superstes fuerit, & cum homagium fecerit, moriatur capitalis dominus, cadit homagium ex parte illa, duret tamen obligatio homagii in persona hæredis, & in persona ejus relevabitur homagium, ita quod de novo capiendum erit ab hærede, & de novo faciendum à tenente. Et sic fieri poterit de pluribus dominis capitalibus decedentibus & hæredibus eorum, in quo casu plura erunt homagia ex parte dominorum, & non nisi unum ex parte tenentis, qui semper superstes est, sed plures homagii innovationes, propter pluralitatem dominorum & eorum hæredum, ideò non dabitur nisi unicum relevium à tenente. Item de uno & eodem tenemento, simul & semel, non possunt plura fieri homagia pluribus dominis capitalibus, sive tenens tenere debeat tenementum de pluribus dominis in communi, vel tantùm ab uno, quia si à pluribus in communi, & unus sit hæres, primogenitus ex pluribus homagium capiat ab uno, vel pluribus. Item si plures tenere debeant in communi de uno vel pluribus, primogenitus homagium faciet pro omnibus. Si autem unus vel plures, qui tenent in communi, de uno tantùm tenuerint, & alicui, cui non tenentur, per ignorantiam vel districtionem injustam homagium fecerint, erit eis subveniendum. Si autem p malitiam & fraudem ad exhæredationem domini sui, nō sic, quia ibi de jure amittere deberent tenem̃ta, extincta penitus obligatione homagii ꝑpter fraudem. Eodem modo, cùm semel homagium fecerit vero domino, p fraudem recesserunt ab eo; si autem ab initio homagium fecerint non dño, & posteà p judicium recuperaverit verus dominus, ratione alicujus finis, vel attornationis, in casibus exceptis, &

f. 79 b.

being one lord, who has taken homages several times, there will not be several homages but one homage, although renewed several times; conversely, when the tenant survives and the chief lord, after he has taken homage, dies, the homage expires on his part, but the obligation of the homage is binding, and the homage will be relieved in his person, so that it will have to be taken anew by the heir, and to be done afresh by the tenant. And so it may be done by several chief lords deceased and by their heirs, in which case there will be several homages on the part of the lords and only one on the part of the tenant, who is always surviving, but several renewals of his homage on account of the plurality of lords and their heirs, accordingly only a single relief will be given by the tenant. Likewise of one and the same tenement together and at one time several homages cannot be made to several chief lords, whether the tenant ought to hold the tenement from several lords in common or from one only, because if from several in common, and there be one heir, the eldest born out of several should take the homage from one or several. Likewise if several ought to hold in common from one or several, the eldest born shall do the homage in behalf of all. But if one or several, who are tenants in common, have held only from one, and through ignorance or an unjust distraint they have done homage to some one to whom they are not bound, they ought to have protection. But if through f. 79 b.
malice and fraud they have done it to the disherison of their lord, not so, for in that case they ought of right to lose their tenements on account of the fraud, the obligation of the homage being entirely extinct. In the same manner, when they have once done homage to the true lord, they have fraudulently withdrawn from him. But if from the commencement they have done homage to him, who is not the true lord, and afterwards the true lord has recovered by a judgment by reason of a fine or an attournment in excepted cases, and the tenant is unwill-

tenens noluerit facere ei homagium, cui tenetur de jure, sed se tenuerit ad homagium, ad quod non tenetur nisi de voluntate, cùm verus dominus posteà recuperaverit homagium & servitium de jure, nō liberabitur tenens ab eo, cui adhæsit de voluntate, sed inde faciat ad melius quod poterit. Item poterit quis de pluribus tenementis plura facere homagia uni domino, simul vel successivè, vel diversis & pluribus, & sic poterunt plures domini plura capere homagia, ratione plurium tenementorum, dum tamen unus ex pluribus dominus sit præcipuus, & legittimus, quia feoffator prim⁹, & propter primum feoffamentum & capitale. Et talis semper habebit maritagium hæredum, propter primum feoffamentum, nisi tenens in capite tenuerit de domino rege, prout inferiùs inter custodias provisum est per statutum.[1] Et si inter dominos suos capitales oriantur inimicitiæ, in propria psona semper stabit cum eo, cui fecit ligeantiam, & per attornatum cum aliis, vel salvo eis forinseco [2] servitio, in quo eis tenetur de tenemento, quod de eis tenet.

6. Item de quibus rebus.

De quibus rebus? & sciendum, quòd de terris & tenementis, redditibus & omnibus aliis q̃ tenentur per servitium militare, sive servitium militare magnum sit, sive minimum, etiam si non daretur ad scutagium nisi obolus unus, & semper sequetur tale servitium custodia hæredis, & maritagium, & non tantùm propter homagium seculare factum, sed propter regale servitium, quia non ad omne homagium sequitur custodia & maritagium, quia homagium fit aliquando, ut suprà dictum est, de tenemento quod tenetur in sockagio.[3] Item fit homagium de tenemento, quod tenetur ad serjantiam, & ibi sequitur custodia & maritagium, maximè si serjantia illa respiciat regem & patriæ defensionem, & secus est, si privatam personam, & in nulla parte

[1] "prout inferius inter custodias "provisum est per statutum," omitted MS. Rawl.

[2] "forinseco," omitted MS. Rawl.

[3] "sokagio," MS. Rawl.

ing to do homage to him, to whom he is bound of right, but holds himself to the homage, to which he is not bound but of his own will, when the true lord shall have recovered afterwards the homage and the service of right, the tenant shall not be liberated from him, to whom he has adhered of his own will, but shall make the best that he can of it. Likewise a person may do several homages for several tenements to one lord together or successively, or to different and several lords, and so several lords may receive several homages by reason of several tenements, provided one out of several be the principal lord, and the legitimate because the first feoffor, and on account of the first and chief feoffment. And such a lord will always have the maritage of the heirs, on account of the first feoffment, unless the tenant in chief holds from the lord the king, as is lower down provided for by statute amongst wardships. And if enmities should arise between their chief lords, he will take his place in person always with him, to whom he has done allegiance, and by attorney with the others or saving to them forinsec service, in which he is bound to them for the tenement, which he holds from them.

6. Likewise for what things he does homage.

Concerning what things? and it is to be known that [homage is done] for lands and tenements, rents and all other things, which are held by military service, whether it be a great military service or a slight one, if there be given only a single farthing for scutage, and the wardship of the heir and the maritage will always follow such a service, and not on account of secular homage having been done, but on account of regal homage, for wardship and maritage do not always follow homage, for homage is done, as has been said above, sometimes for a tenement, which is held in sockage. Likewise homage is done for a tenement held in serjeanty, and there wardship and maritage follow, if that serjeanty regards the king and the defence of the country, and it is otherwise, if it

ipsum regem vel exercitum suum. Sunt enim plures serjantiæ quæ respiciunt privatas personas, & non ipsum regem, ut si quis debeat equitare cum domino suo de manerio in manerium, & tales dicuntur Rodknights, vel si teneat tenementum aliquod per serjantiam tenendi placita sua, vel portandi brevia sua infra certa loca, & hujusmodi; & si tales aliquando faciant homagium, non prætextu talis homagii pertinebit ad capitalem dominum custodia & maritagium. De feodo verò vel redditu, qui datur ex camera, sive tenemento de quo possit redditus pervenire, non fit homagium. Nec pro solo dominio fit homagium, nisi soli regi vel principi, sine tenemento vel servitio, admittitur tamen quandoque quòd campiones faciunt homagium domino suo, sed hoc esse non debet, nisi tantùm pro dominio suo,[1] nec valet homagium, si redditus sit annuus, & de camera, nisi constituatur & proveniat ex certo tenemento. Tenementum verò certum, q datur alicui in feodo per servitium militare, obligat tenentem ad homagium. Quod quidem si omnino ab alio evincatur à tenente, per hoc omnino homagium dissolvitur & extinguitur, nec revocari poterit, nec resuscitari, nisi ex nova causa, & quamdiu talis fuerit in possessione, licèt aliud jus habuerit, durat homagium inter tenentem & non dominum qui feoffavit, donec tenementum evincatur, & ulteriùs non. De nullo autem tenemento, quod tenetur ad terminum, fit homagium, fit tamen inde fidelitatis sacramentum.

Britton, l. iii. ch. iv. § 20, § 31.

Glanville, li. 9, c. 2.

f. 80.

7. Per quas personas.

Per quas personas? Et sciendum quòd non per procuratores, nec per literas fieri poterit homagium, sed in propria persona tam domini, quàm tenentis, capi debet & fieri; quia in quibuscunque casibus persona necessaria fuerit, negotium per procuratorem vel literas expediri non poterit.

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[1] "suo," omitted MS. Rawl.

regards a private person, and in no part the king himself or his army. For there are several serjeanties, which regard private persons and not the king himself, as if one ought to ride with one's lord from manor to manor, and such serjeanties are called Rodknights, or if he holds a certain tenement by serjeanty of holding his pleas or of carrying his writs within certain localities, and such like, and if such persons by chance do homage, the custody and the maritage shall not belong to the chief lord under pretext of such homage. But for a fief or a rent, which is rendered for a chamber,[1] or a tenement, from which a rent may be derived, homage is not done. Nor is homage done on account of lordship alone, except to the king or the prince, without a tenement or a service; it is admitted, however, sometimes that champions do homage to their lord, but this ought not to be except only on account of their lordship, nor is homage of value, if there be an annual rent and from a chamber, unless it is settled and is derived from a certain tenement. But a certain tenement, which is given to any one in fee for a military service, obliges the tenant to homage. But if he be f. 80. evicted altogether by another from the tenement, the homage is thereby altogether dissolved and extinguished, nor can it be recalled, nor resuscitated except from a new cause, and as long as such an one is in possession, although he has a different right, the homage lasts between the tenant and the feoffor, although he is not the lord, until the tenant is evicted, and no further. But homage is done for no tenement, which is held for a term, an oath of fealty, however, is taken for it.

7. By what persons homage is done.

By what persons? And it is to be known that homage cannot be done through proxies, nor by letter, but it ought to be received and done in proper person, by the lord as well as by the tenant, because in whatsoever cases the person is necessary, the business cannot be done by proxy or letter.

[1] Britton says otherwise, compare Fleta, 20.

8. Qualiter et per quæ verba.

Britton, l. iii. ch. iv. § 10. Fleta, 207. Britton, *ib.*, § 18. Fleta, *ib.*

Item qualiter & per quæ verba fieri debeat homagium? Et sciendum, quòd ille, qui homagium suum facere debet, obtentu reverentiæ quam debet domino suo, adire debet dominum suum ubicunque inventus fuerit in regno, vel alibi si possit cõmode adiri, & non tenetur dominus quærere suum tenentem, & sic debet homagium ei facere. Debet quidem tenens manus suas utrasque ponere inter manus utrasque domini sui, per quod significatur ex parte domini protectio, defensio & warrantia, & ex parte tenentis reverentia & subjectio; & debet dicere hæc verba. Devenio homo vester, de tenemento quod de vobis teneo, (vel aliter) quod de vobis teneo & tenere debeo, & fidem vobis portabo de vita & membris, & terreno honore (secundùm quosdam, vel aliter, secundùm alios) de corpore & catallis & terreno honore, & fidem vobis portabo contra omnes gentes (qui vivere poterint & mori, secundùm quosdam) salva fide debita domino regi, & hæredibus suis, & statim post faciat domino suo sacramentum fidelitatis hoc modo.

9. Item qualiter sacramentum fidelitatis.

Hoc audis, domine N., quòd fidem vobis portabo de vita & membris, corpore, & catallis, & terreno honore, sic me Deus adjuvet & hæc sancta Dei euangelia.[1] Et quidam hoc adjiciunt in sacramento & benè, quòd fideliter, & sine diminutione, contradictione, vel impedimento & dilatione injusta, terminis statutis faciet servitium suum domino suo, & hæredibus suis. Et non debet fieri homagium privatim, sed in loco publico & communi, coram pluribus in cõm, hundr, vel curia, ut si fortè tenens per malitiam homagium vellet dedicere, posset dñs faciliùs probationem habere de homagio facto, & servitio recognito, quia ad homag' faciend' p̃cedere debet diligens examinatio, si ille, qui

[1] "hæc sancta" is the reading of MS. Rawl., namely, "these sacred relics." The oath upon the New Testament, Dei evangelia, was of more modern introduction.

8. In what manner and by what words homage ought to be done.

Likewise in what manner and by what words ought homage to be done? And it is to be known that he, who ought to do his homage, having in view the reverence which he owes to his lord, ought to wait upon his lord wherever he may be found in the kingdom, or elsewhere, if he can be conveniently waited upon, and the lord is not bound to seek his tenant, and thus he ought to do homage. He ought indeed, holding up his two hands, to place them between the two hands of the lord, by which is signified, on the part of his lord protection, defence and warranty, and on the part of the tenant reverence and subjection, and he ought to say these words: I become your man in respect of the tenement (or otherwise) which I hold of you and ought to hold, and I will bear you fealty of my life and limbs and earthly honour (according to some), and (according to others otherwise) of my person and chattels and earthly honour, and I will bear you fealty against all folks (who can live or die, according to some), saving the fealty due to the lord the king and to his heirs, and immediately forthwith he shall make to his lord an oath of fealty in this manner.

9. In what way he shall make the oath of fealty.

This you hear, my lord N., that I will bear you fealty of my life and limbs, body and chattels, and earthly honour, So help me God and these Holy Gospels. And some add this in the oath, and well so, that faithfully and without any diminution, contradiction, or impediment or unjust delay, at fixed terms he will perform his service to his lord and to his heirs. And homage ought not to be done in a private place, but in a public and common place, in the presence of several persons, in the county or the hundred or in the court, as if the tenant through malice perchance should wish to deny his homage, the lord may the more easily have proof of homage having been done and service acknowledged, because a diligent examination ought to precede the doing of homage, whether he, who makes himself out to be heir, is the

hæredē se facit, sit filius naturalis ejus, cujus hæredē se facit, & hæres rectus & propinquior, quantum ad jus possessionis, & non soł rectꝰ & ꝑpinquus, sed si sit hæres propinquior, quantum ad jus proprietatis; quilibet autē hæres propinquior utrumq; jus habere debet, possessionis videlicet & proprietatis, quamvis alius eo majus jus habuerit.

10. Quæ sunt inquirenda et tenenda in sacramento fidelitatis.

Item inquiri debeat quale, & quantum tenementum teneat, pro quo, & de quo obligatur homagiū facere. Item quid in dominico, & quid in servitio, & utrum totum tenementum teneat in dominico, vel totum in servitio, vel partem in dominico, & partem in servitio. Item per quod servitium, & qualiter descendat ei hæreditas, q̣ hæres esse possit, ne in captione homagii contingat dñm per negligentiā decipi, vel per errorē.

11. Quis effectus homagii.

Effectus vero homagii est, quòd si quis homagium alteri fecerit, domino vel non dño, à tali dño, vel homagio suo recedere non possit sine judicio, quamdiu tenuerit tenementum, per q̣ obligatur ad homagium, in dominico vel servitio. Item nihil facere potest tenens ꝑpter obligationem homagii, q̣ vertatur domino ad exhæredationē vel aliā atrocem injuriā, nec dominus tenenti è converso, quòd si fecerint, dissolvitur & extinguitur homag' om̄ino, & homagii connexio & obligatio, & erit inde justum judicium, cùm venerit contra homagium & fidelitatis sacramenť, quòd in eo, in quo delinquunt, puniantur, sc. in persona domini, quòd amittat dominium, & in persona tenentis, quòd amittat tenementum, secundùm quod inferiùs dicetur pleniùs. Et sic dissolvi poterit homagium.

natural son of him, whose heir he makes himself out to be, and the right and next heir as regards the right of possession, and not merely a right and near heir, but whether there be a nearer heir as regards the right of property, but every next heir ought to have both rights, namely that of possession and that of property, although another may have greater right than he has.

10. What things are to be inquired into, and what are to be held under the oath of fealty.

Likewise an inquiry should be made what sort of and what extent of tenement he holds, for which and in respect of which he is obliged to do homage. Likewise what he holds in domain and what in service, and whether he holds the whole tenement in domain or the whole in service, or part in domain and part in service. Likewise by what service or in what manner the inheritance descends to him, so that he may be heir, lest in taking homage it should happen that the lord is deceived through negligence or through error.

11. What is the effect of homage.

But the effect of homage is, that if a person has done homage to another, his lord or not his lord, he cannot withdraw from such a lord or from his homage without a judgment, as long as he holds the tenement, for which he is bound to homage, in domain or in service. Likewise the tenant can do nothing on account of the obligation of homage, which may turn to the disherison of the lord or to any other atrocious injury, nor can the lord [do any such thing] to the tenant conversely, and if they should [either of them] do so, the homage is altogether dissolved and extinguished, and likewise the connection and the obligation of the homage, and the judgment thereon will be just, which is against the homage and the oath of fealty, that they should be punished in that in which they are delinquent, to wit, in the person of the lord, that he should lose his lordship, and in the person of the tenant, that he should lose his tenement, according to what will be stated more fully below. And so the homage may be dissolved.

12. Qualiter homagium dissolvatur et extinguatur.

Qualiter autem dissolvatur[1] homagium, ex una parte vel utraque, domini & tenentis, ita quòd ex una parte teneat, & ex alia non, vel ex utraque parte deficiat, videndum. Et sciendum, q aliquando tenet homagium & homagii connexio in persona tenentis, & omnino dissolvitur & extinguitur in ꝑsona dñi capitalis, ꝑpter defect', vel ꝑpter delict' ipsius domini. Sed relevatur & vivificatur in ꝑsona alterius domini superioris dñi[2] ꝑpter defectum. Ut si capitalis dominus, qui homa-
f. 80 b. gium tenentis sui ceperit, omnino sine hærede decesserit, vel si hæredes habuerit & defecerint, vel cùm hæredes habuerit, alteri homagium & servitium attornaverit in casibus licitis & concessis, vel alio modo de voluntate tenentis, in quo casu extinguitur homagium quoad ipsum dominum, & in persona alterius reviviscit,
Britton, l. iii. ch. iv. § 26. Fleta, 208. & semper durat in persona tenentis. Item ꝑpter delict', ut si dñs capitalis feloniam fecerit, vel aliquid ad exhæredationem tenentis sui, ꝑpter quod ipse dominus justo judicio debeat exhæredari, & unde ipse omnino de medio tollitur, & id quod superior dominus capitalis priùs habuit per medium, in servitiis & consuetudinibus, nunc habet immediatè propter delictum sui tenentis, sicut superiùs habet ꝑ defectum, & sic incipit obligatio homagii inter tenentem & capitalem dominum superiorem, & tenetur talis dominus superior homagium capere, velit nolit, quia si recusare posset & weyviare feodum suum & homagium & servitium tenentis sui, tale sequeretur inconveniens, quòd nunquam fieret alicujus tenementi warrātia. Nunquam enim faceret aliquis warrantiam & excambium de C. libratis terræ ꝑ servitio unus denarii, si posset pro voluntate sua feod' suum mutare & weyviare, & homagium & servitium tenentis sui recusare. Objicere tamen posset

[1] " solvatur," MS. Rawl. | [2] " domini," omitted, MS. Rawl.

12. In what way homage is dissolved and is extinguished.

But in what way homage is dissolved on one side or on the other, the lord's or the tenant's, so that it holds on one side and not on the other, or it fails on both sides, must be considered. And it is to be known that sometimes the homage and the link of homage holds in the person of the tenant, and is altogether dissolved and extinguished in the person of the chief lord on account of the failure or the delinquency of the lord himself. But it is relieved and revived in the person of another superior lord on account of the failure. As, for instance, if a chief lord, who has taken the homage of his tenant, should die altogether f. 80 b. without an heir, or if he has had heirs and they have failed, or when he has had heirs, he has transferred the homage and the service to another in allowed and permitted cases, or in some other manner with the consent of the tenant, in which case the homage is extinguished as regards the lord himself, and revives in the person of the other, and always endures in the person of the tenant. Likewise for delinquency, as if the chief lord has committed a felony, or has done something to the disherison of his tenant, on account of which the lord himself ought to be disinherited by a just judgment, and whence he is altogether removed from the midst, and that which the superior lord in chief formerly had through an intermediate lord in services and in customs, he now has immediately on account of the delinquency of his tenant, as he has above on account of his failure, and so the obligation of homage commences between the tenant and the superior lord in chief, and such superior lord is bound, whether he wishes or not, to receive homage, for if he could refuse and waive his fief and the homage and the service of his tenant, such inconvenience would follow, that there would be no warranty of any tenement. For no one would make a warranty and exchange of a hundred pounds worth of land for the service of one penny, if he could at his will change and waive his fief, and refuse the homage and the service of his tenant. Such a chief lord, however, might

talis dominus capitalis tali tenenti homagium suum offerenti, quòd illud recipere non debeat, cùm talis tenens non sit feoffatus ab eo, sed ab alio, & ideò quòd nihil clamat in homagio suo & servitio, sed quòd hoc ei valere non debeat, videtur, quia cùm plures possint esse capitales dñi & feoffatores ascendendo, ita sunt plures feoffati tenentes descendendo, & superior dominus omnium habet infimum tenentem sibi obligatum, propter feodum suum quod talis tenet, quamvis p̄ medium, quo sublato erit tenens suus sine medio, & ipse dñs suus capitalis erit quasi principalis feoffator, & sic durabit inter eos obligatio homagii p̄ medium,
f. 81. vel sine medio. Ut si feoffavero A. et A. B. et B. C. et sic in infinitum, omnes tenentes de tenente in tenentē, à primo usq; ad ultimū descendendo, erunt tenentes mei, et ab ultimo feoffato et tenente de capitali dño et in capitalem dñm ascendendo gradatim, erit capitalis dñs ultimi feoffati, ab ultimo feoffatore usq; ad primum, sed p̄ medium, ut dictum est. Quo sublato vel quibus, incipiet ultimo feoffatus esse primus feoffat⁹ sine medio. Itē eodē modo tenere poterit homagium in p̄sona domini vice versa, et dissolvi et extingui in p̄sona tenentis et convalescere in persona alterius, ut si tenens, cùm homagium fecerit dño suo, se dimiserit ex toto de hæreditate sua et alium feoffaverit, tenendū de dño capitali, et quo casu tenens absolvitur ab homagio et extinguitur homagium, velit nolit dñs capitalis, et incipit in persona feoffati, qui obligatur p̄pter tenementum q̄ tenet, quod est feodū dñi capitalis. Item homagium, quod sic extinguitur

object to such a tenant offering his homage, that he ought not to receive it, since such tenant was not enfeoffed by him, but by another person, and therefore that he has no claim upon his homage and his service, but it seems that this [objection] ought not to avail him, since as there may be several chief lords and feoffors in an ascending line, so there are several feoffees and tenants in a descending line, and the chief lord of all has the lowest tenant bound to him, on account of the fief which such an one holds, although through another intermediately, upon whose removal he will be his tenant immediately, and himself his chief lord will be as it were the principal feoffor, and so the obligation of homage will endure between them through an intermediate person or without an intermediate person. As for instance if I f. 81. have enfeoffed A., and A. has enfeoffed B., and B. has enfeoffed C.; and so in an infinite line all the tenants from tenant to tenant, from the first to the last in a descending line, will be my tenants, and from the last feoffee and tenant of the chief lord and to the chief lord by ascending gradually, the chief lord will be [the lord] of the last feoffee, from the last feoffor to the first, but intermediately as it is said. Upon failure of whom, whether one or more, the last feoffee will become the first feoffee without any intermediate one. In the same way homage may hold good in the person of the lord conversely, and be dissolved and extinguished in the person of a tenant and revive in the person of another tenant, as for instance if a tenant, when he has done homage to his lord, has dismissed himself altogether from his inheritance and has enfeoffed another to hold of the chief lord, and in which case the tenant is released from his homage and the homage is extinguished, whether the chief lord is willing or not, and it commences in the person of the feoffee, who is bound on account of the tenement, which he holds, which is a fief of the chief lord. Likewise the homage, which is then extinguished in the person of the

in ꝑsona tenentis iterum revivisci poterit in ꝑsona ejusdem, sed ex alia causa. Ut si, feoffatus ab eo, idem teneñtum ei restituat, tenendū de eodē capitali dño. Itē extingui poterit homagiū et obligatio dissolvi ex utraq; parte multis modis, q teneñtum datum ꝑ homagio et servitio remanebit capitali dño tanquā eschaeta sua in doñico, tum ꝑpter defectum tum ꝑpter delictū: ꝑpt̄ defectum, ut si tenens & feoffatus sibi & hæredib⁹ suis certis vel incertis sine hæredib⁹ decesserit omnino, vel sine hærede de se, et quo casu extinguit̄ omnino homagiū & obligatio, quia teneñtum cadit in dñicum ꝑ defectu homagii, quia non sunt partes inter quas contrahi possit, cùm cōtrahi nō possit nisi inter duas ꝑsonas obligatio, quia deficiunt hæredes in ꝑsonis quorum posset homagiū sustētari. Et qualiter hoc fit in pluribus casib⁹, dicetur infrà de eschaetis pleniùs. Item ꝑpt̄ delictū. Ut si tenens alicujus feloniam fecerit vel aliquid aliud, ꝑpter q debeat exhæredari, et quo casu extinguitur homagium, et dissolvitur obligatio ex utraq; parte ratione supradicta, & revertit teneñtum ad capitalem dñm in dñico, ut eschaeta. Itē extinguit̄ homagiū de jure, & dissolvitur obligatio & vinculū fidelitatis, ut cùm quis homagiū fecerit capitali dño suo & servitium illud malitiosè deadvocaverit omnino, q nihil tenuerit de eo, ad exhæredationē veri dñi sui, cui ꝑ homagiū obligat⁹ fuerat & fidelitatis sacrañtū, & quo casu, licèt homagiū & obligatio teneat ex parte dñi si voluerit, non tamen tenet ex parte tenentis, qui ꝑ abnegationem dñi sui homagiū & vinculū fidelitatis infringit. Et cōpetunt dño in hoc casu

Britton, l. iii. ch. iv. § 27.
Fleta, 208. (§ 31.)

tenant may be revived again in the person of the same, but from another cause. As if, having been enfeoffed by him, he should restore to him the same tenement to be held of the same chief lord. Likewise the homage may be extinguished and the obligation dissolved on both sides in many ways, because a tenement given for homage and service will remain to the chief lord as if it were an escheat in his domain, as well on account of failure as of delinquency; on account of failure, as if a tenant and feoffee, for himself and his heirs, certain or uncertain, has departed altogether without heirs, or without an heir of his body, and in which case the homage and obligation are altogether extinguished, because the tenement falls into the domain from failure of homage, since there are no parties between whom the contract can be made, for an obligation cannot be contracted unless between two parties, because heirs fail, in whose persons the homage might be sustained. And in what way this is done in several cases will be explained below more fully in [treating of] escheats. Likewise on account of delinquencies. As if a tenant of a certain person has committed a felony or some other act, on account of which he ought to be disinherited, and in which case his homage is extinguished, and the obligation dissolved on either side for the reason abovesaid, and the tenement reverts to the chief lord in domain as an escheat. Likewise homage is extinguished of right and the obligation and bond of fealty is dissolved; as for instance, when a person has done homage to his chief lord, and shall have maliciously disavowed altogether that service, that he held nothing from him, to the disherison of his true lord, to whom he has been bound by his homage and oath of fealty, and in which case although the homage and obligation holds good on the part of the lord, if he wishes, it does not, however, hold good on the part of the tenant, who by the repudiation of his lord infringes his homage and his bond of fealty.

duo remedia, ut videtur, vel quòd petat tenem̃tum tenētis sui, q̃ de eo tenere debuit in dominico, quia deadvocat^{9} est p̃ tenentē, in cuj^{9} p̃sona deficit obligatio, vel quòd petat servitium, eò quòd tenet obligatio in psona sua & remittat tenenti de gratia tenem̃tum. Refert tamen p̃ q̃ breve, si autē p̃ breve de recto, ut quidā dicunt, videtur q̃ nō possit, nisi ipse vel antecessores sui in seysina fuerint de tenem̃to illo in dominico vel servitio. Et si aliquando extiterint in seysina, tamen incongruè petet per aliquem descensum, cùm tenens extiterit in possessione per descensum ab antecessoribus suis, nisi sit qui dicat, quòd licèt nihil juris ei descendat, tamen quòd ei descendere debuit, cùm sit deadvocatus. Sed melius esset, ut videtur, petere
f. 81 b. per breve de eschaeta; cùm deficiat homagiū & obligatio ex parte tenentis, q̃ breve tale esse poterit. Præcipe tali, q̃ justè & sine dilatione reddat tali tantā terram vel tot feoda, quæ p̃dict^{9} talis de eo tenuit et inde homagiū ei fecit et servitiū, et quæ debent esse eschaeta sua, eò quòd p̃dict^{9} talis tenens, cōtra homagiū suū et fidelitatis sacram̃tum, q̃ ei inde fecerat, ipsum malitiosè et ad exhæredationē suā deadvocavit, & nisi fecerit &c. Et unde ut videtur, cùm sic p̃batū fuerit p̃ inquisitionē et juratā, non erit ulteriùs necesse
Britton, l. iii. ch. iv. § 28. quærere de aliquo juris descēsu. Et sive agatur p̃ tale breve, sive p̃ breve de recto, nō erit loc^{9} magnæ
Fleta, 209. assisæ nec duello, sed capietur inquisitio & jurata, ad similitudinē magnæ assisæ, p̃ hæc verba. Utrū vz. ille qui tenet, maj^{9} jus habeat tenendi teñtum illud, vel

And the lord in this case is entitled to two remedies, as it seems, either that he should claim the tenement of his tenant, which he ought to hold of him in domain, because he is disavowed by the tenant, in whose person the obligation fails, or that he should claim the service, on the ground that the obligation holds good in his person, and should remit of grace to the tenant the tenement. It is of importance, however, by what writ, for if it is by a writ of right, as some say, it seems that he cannot, unless he himself or his ancestors have been in seysine of that tenement in domain or in service. And if they have been sometime in seysine, nevertheless it will be incongruous for them to claim by any descent, when the tenant has been in possession by descent from his ancestors, unless there be some one who will say, that although no right descends to him, nevertheless that it ought to descend to him since he is disavowed. But it would be better, as it seems, to claim it by a writ of escheat, since the homage and obligation on the part of the tenant fails, which writ f. 81 b.
may be of this tenor. Enjoin such an one, that justly and without delay he restore to so and so so much land and so many fiefs, which the said so and so held from him and thence did homage to him and service, and which ought to be his escheats, by reason that so and so aforesaid his tenant, contrary to his homage and oath of fealty, which he had taken to him thereon, has disavowed him maliciously and to his disherison, and unless he so does, &c. And hence as it appears, when it has been so proved by an inquest and a jury, it will not be further necessary to inquire as to any further descent of right. And whether the proceeding be by such a writ or by a writ of right, there will be no place for the great assise nor for a duel, but an inquest and jury shall be held after the likeness of a great assise through these words. Whether for instance he, who holds, has the greater right of holding that tenement or fief in domain, or he, who

feodū in dñico, an ille q̄ petit, et cui idē tenens vel aliquis antecessorū suorū inde homagiū & servitiū fecit, et quem postmodū malitiosè cōtra homagiū et fidelitatē suā deadvocavit; et si hoc p̄batū fuerit, et tenens tenuerit in dñico, recuperabit petēs in dñico, si autē in servitio, recuperabit in servitio, ut tenens tollatur de medio, ita q̄ de cætero non sit medi⁹ et tenens su⁹ p̄ obligationē teñti, q̄ de eo priùs tenuerat, sed adjūgatur primo feoffatori sine medio. Itē ibi idē jus, ubi eadē ratio; si tenens dño suo atrocē fecerit injuriā, vel si steterit cum inimico dñi sui, cōsilio, vel auxilio cōtra dñm suū, excepto principe, & capitali dño suo, cui fecit ligeātiā. Itē si aliquid fecerit cōtra dñm suum ad exhæredationē dñi sui, et quo casu, justū judiciū, quòd tenens exhæredetur, p̄pter obligationē homagii quam infringit. Item si man⁹ violentas injecerit super dñm suum &c. plura hiis similia tenentē exhæredāt. Et in fine sciendū, q̄ inter tenentē & dñm semper tenet & stat homagiū, quādiu hæredes ex utraq̄ parte extiterint, et quamdiu tenēs tenem̄tum tenuerit in dñico, vel servitio, q̄ obligationē homagii inducit. Sed istis deficientib⁹ vel aliquo istorū, deficit homagium, & nunquā reviviscet, nisi hoc sit ex nova causa & in p̄sonis aliorum. Itē notandū, q̄ nō potest dñs capitalis wayviare homagiū, vel recusare servitium, cōtra voluntatē tenentis sui, quò minùs teneatur ad warrantiā et excambium, nec etiam tenens vice versa, quò minùs faciat dño suo servitium debitū, quamdiu tenuerit tenem̄tum, p̄pter q̄ obligat̄ ad servitium, sed potest dñm suum deadvocare, cùm tenem̄tum tenuerit. Sed hoc, ut p̄dictū est, erit suum damnum. Poterit etiā tenem̄tum wayviare cum causa vel sine, et sic

Britton, l. ii. ch. x. § 1. Fleta, 169.

claims it, and to whom the same tenant or some of his ancestors did homage and service therefrom, and whom afterwards he has maliciously disavowed contrary to his homage and his fealty, and if this has been proved, and the tenant has held in domain, the claimant in domain shall recover it, but if [he claims] in service, he shall recover in service, that the tenant intermediate shall be removed, so that in future there shall be no intermediate tenant of his by the obligation of the tenement, which he held from him formerly, but he shall be annexed to the first feoffor without a middle [feoffee]. Likewise, where there is the same reason, there is the same right, if the tenant has done to his lord an atrocious injury, or if he has taken the side of the enemy of his lord with counsel or with aid against his lord, excepting the prince or his chief lord, to whom he has done allegiance. Likewise if he has done anything against his lord to the disherison of his lord, and in which case it is a just judgment, that the tenant be disherited on account of the obligation of his homage, which he has broken. Likewise if he has laid violent hands upon his lord, &c. Several things similar to this disherit a tenant. And in the end it is to be known, that between the tenant and the lord homage always holds and stands fast, as long as heirs on either side exist, and as long as the tenant holds his tenement in domain or in service, which implies the obligation of homage. But when those fail or some of them, homage fails and will never revive, unless this be from a new cause and in the persons of others. Likewise it is to be noted, that the chief lord cannot waive homage or refuse service, against the wish of his tenant, so as not to be bound to warranty and to exchange, nor the tenant conversely, so as not to perform the due service for his lord, as long as he holds the tenement, on account of which he is bound to the service, but he may disavow his lord, when he holds the tenement, but this, as aforesaid, will be his loss. He may also waive the tenement with a

dissolvetur homagium. Itē reddere poterit dño suo homagium suum, simul cum tenemento, ꝑpter capitales inimicitias, ut liberiùs ꝑsequatur appellum suum, & sic dissolvitur homagiū.

13. Si dominus possit attornare homagium et servitium tenentis contra voluntatem tenentis.

Itē videndum, si dñs attornare possit alicui homagiū & servitium tenentis sui, cōtra voluntatē ipsius tenentis; et videtur quòd nō, et maximè homagium, quia tale sequeretur incōveniens, quòd posset eum subjugare capitali inimico suo, & ꝑ q̄ tenereť sacrām̃tum fidelitatis facere ei, qui eum dānificare intenderet. Levis autē inimicitia nō impedit in quibusdā casib⁹ superiùs exceptis, in quib⁹ poterit dñs capitalis homagiū & servitiū liberi hominis sui alteri attornare cōtra voluntatē tenētis, velit nolit, s. ꝑ finē factum in curia dñi regis, ubi summonēd⁹ est ille, cuj⁹ homagium & servitium alteri concediť, ut ibi recognoscat homagium & servitium suum, et ubi ostendere possit rationē, quare non debeat homagiū facere, q̄ si non poterit, attornabitur, velit nolit. Item in alio casu, ut si quis terrā dederit in maritagium cum filia sua cum homagio et servitio alicuj⁹ liberi hominis. Item si ꝑ redemptione corporis sui, in quib⁹ casib⁹ attornabitur, velit nolit, nisi causas prætendere possit, quare non debeat. Est & alia causa, quare homagium & servitiū attornare non possit, ut si velit homagium attornare tali, qui nihil habeat in bonis, unde posset warrātizare, defendere et excambium facere. Ex hoc enim posset quilibet dñs capitalis exonerare se ꝑ voluntate sua, ne suo feoffato teneretur ad warrantiā & excambium de C. libratis terræ, ꝑ uno denario de servitio, & ideò in hoc casu nō magis possit attornare homagiū et servitium, quàm

f. 82. Britton, l. ii. ch. x. § 1. Fleta, 209.

cause or without, and so the homage will be dissolved. Likewise he may render back to his lord his homage, together with the tenement on account of capital enmities, that he may more freely pursue his appeal, and thus homage is dissolved.

13. Whether the lord can attourn the homage and service of a tenant against the will of the tenant.

Likewise we must consider, if the lord can attourn to any one the homage and service of his tenant against the will of the tenant himself, and it seems not so, and chiefly the homage, because an inconvenience of this kind would follow, that he might make him subject to his chief enemy, and because he would be bound to take on oath of fealty to him, who intends to damnify him. But a slight enmity is no obstacle in certain cases above excepted, in which the chief lord may attourn the homage and service of his free man to another against the will of the tenant, whether he will or not, to wit, by a fine made in the court of the lord the king, where he is to be summoned, whose homage and service is granted to another, that he may there acknowledge his homage and service, f. 82. and where he may show reason why he ought not to do homage, which reason, if he cannot show, he will be attourned, whether he will or not. Likewise, in another case, as for instance if a person has given land in maritage with his daughter with the homage and the service of a certain free man. Likewise if for the redemption of his own body, in which cases he will be attourned whether he will or not, unless he can show cause wherefore he ought not. There is likewise another cause why he cannot attourn homage and service, as if he should wish to attourn homage to a person who has no goods, with which he can warrant, defend, or make exchange. For by such means any chief lord might exonerate himself, at his pleasure, from being bound to his feoffee to the warranty and exchange of one hundred acres of land, for one penny of service, and accordingly in this case he cannot attourn the homage and the service any more than he can waive his fief, for the lord, whether he wills

wayviare feodū suum, quia dñs, velit nolit, warrantizabit et defendet ꝑpt̄ homagium. Et q̄ homagium [1] attornare non poterit nisi in casib⁹ superiùs exceptis, habetis de t̄mino P. añ regis H. septimo, in com̄ Hereford de itinere et uno teñto in com̄ Cant̄ de Wilhelmo filio Benedicti cive Londoñ, et Galfrido de Luci [2] tenente et Wilhelmo de Maundevil comite capitale [3] dño, de teneñto N. de Gingesnyle.[4] Et cùm idē Galfrid⁹ tenens attachiat⁹ esset vel summonit⁹ ad faciēdū eidē W. homagiū et servitiū suū, q̄ idē comes ei dederat, & prædict' Galfridū eidē W. attornaverat, idē Galfrid⁹ noluit ei attornare, sed ipsum in curia penit⁹ deadvocavit, et dixit quòd nihil de eo tenuit, nec tenere voluit, nec recedere à dño suo qui eum feoffavit. Propt̄ q̄ summonit⁹ fuit prædict⁹ comes, ad ostendendum q̄ juris clamaret in servitio prædicti G. qui venit & cognovit, q̄ dederat prædicto W. homagiū et servitiū ipsi⁹ G. de teneñto, q̄ de eo tenuit in prædicta villa, ad q̄ respōdit prædict⁹ G. q̄ noluit attornare prædicto W. nisi curia cōsideraret. Dixit etiam, q̄ tenuit de dño comite duo teñta, unū in villa prædicta et aliud alibi, et simul et semel feoffat⁹ fuit de eisdē teneñtis p̄ unicū homagiū & servitiū, nec voluit homagiū suum dividere et facere duo, ubi priùs non fecit nisi unum, nisi curia cōsideraret, nec attornari p̄dicto W. Et quia comes cognovit et cōcessit, q̄ idē G. faceret servitiū eidē W. de prædicto teñto in prædicta villa in omnib⁹ reb⁹, et quia idem G. nihil ostendit in curia, quare servitium illud eidē W. facere nō posset vel non deberet, cōsideratū fuit, q̄ prædict⁹ W. haberet seysinā suā

[1] "quod homagium," omitted MS. Rawl.
[2] "Lucy," MS. Rawl.
[3] "capitali," id.
[4] "Gyngewill," id.

or not, will warrant and defend it on account of the homage. And that he cannot attourn the homage except in the cases above excepted, you have a case in Easter term in the seventh year of King Henry, in the county of Hereford, respecting a path-way, and one tenement in the county of Kent, of William the son of Benedict a citizen of London, and Galfred di Luce a tenant, and William count of Maundevil, his chief lord, concerning a tenement N. de Gingesnyle. And when the said Galfrid the tenant was attached or summoned to do homage and his service to the said William, which the said count had given to him, and the said Galfrid had attourned to the said William, the said Galfrid would not attourn to him, but disavowed him altogether in court, and said that he held nothing of him, and would hold nothing of him, nor would he withdraw from the lord, who had enfeoffed him. Wherefore the said count was summoned, to show what right he claimed to the service of the aforesaid Galfrid, who came and acknowledged that he had given to the aforesaid William the homage and the service of the said Galfrid in respect of a tenement, which he held of him in the aforesaid vill, to which the aforesaid Galfrid replied, that he was unwilling to attourn to the aforesaid William, unless the court should adjudge so. He said also, that he held of the said count two tenements, one in the vill aforesaid and another elsewhere, and that he had been enfeoffed at one and the same time unto both by a single homage and service, and that he was not willing to divide his homage and do two homages, where formerly he only done one, unless the court so held, nor to be attourned to the said William. And because the said court had acknowledged and granted that the said Galfrid should do service to the said William for the said tenement in the aforesaid vill in all things, and because the said Galfrid has shown nothing in the court, why he cannot or ought not to do service to the said William, it was held that the said William should have his

de p̃dicto servitio, salvo dicto comiti homagio de toto prædicto feodo, & hoc ideò ut videtur, quia homagiū dividi nec attornari nō potuit cōtra voluntatem tenentis, licèt servitium dividi posset & attornari, & sic videtur quòd servitium attornari poterit in omni casu, et cōtra voluntatē tenentis ipsi^{9}, licèt homagium non possit, nisi in casib^{9} supradictis. Et unde si cùm dñs servitiū attornare voluerit, tenens attornari noluerit, et ipse cui attornat^{9} fuerit, districtionē fecerit, poterit tenens, si voluerit, illū deadvocare, cui fuerit, attornat^{9} et justè, ꝑꝑ̃ homagium, q̃ durat adhuc inter dñm, qui servitium attornavit, & tenentē suū. Sed tamen ꝑꝑ̃ hoc cessare nō debet districtio ꝑ servitio, quia districtio ꝑtinet ad servitiū habendū & non ad homagium, quia dñs retinuit homagium, et qui cōcedit servitium alicui, ꝑ consequens cōcedit districtionem, quia servi-
f. 82 b. tium cōcedere sine districtione nihil est, nō magis est quàm si diceret quis, Concedo tibi haustum in fonte meo, sed nolo q̃ tu habeas accessum ad fontē, & sic nulla erit cōcessio, & multa sunt exempla, & unde si tenens deadvocaverit illum qui distringit ꝑ servitio, non tamē cessare debet districtio ꝑ servitio, quia ista simul stare possunt, deadvocatio & districtio. Sed si simul ꝑ homagio distringatur cū servitio, & sic fiat deadvocatio, dicunt quidā q̃ cessat districtio, nisi sit qui dicat, q̃ si donatio et cōcessio cōstare non posset ꝑ una parte vz. homagio, tamen valere debeat de servitio, & ita non deberet cessare districtio, si ita cùm unū tenere possit, invito tenēte, & aliud nō, et nisi ita sit q̃ homagiū dedicere nō possit, et si dicat injustè

seysine of the said service, saving to the aforesaid count his homage from the whole fief, and that for this reason as it seems, because the homage could not be divided nor attourned against the will of the tenant, although the service might be divided and attourned, and so it seems that the service may be attourned in every case, and against the will of the tenant himself, although the homage may not, except in the cases aforesaid. And hence if, when the lord wishes to attourn a service, the tenant is unwilling to be attourned, and he, to whom he has been attourned, has made a distraint, the tenant, if he wills, may disavow him to whom he has been attourned and justly so, on account of the homage, which endures still between the lord, who has attourned the service, and his tenant. But nevertheless the distraint for the service ought not on that account to abate, because distraint pertains to the service being tendered and not to the homage, because the lord has retained the homage, and he who concedes the service, concedes as a consequence the distraint, for to concede a service without the distraint is nothing, precisely as if any one should say, I grant you a right to draw water at my fountain, but I am unwilling that you should have access to my fountain, and so there would be no grant, f. 82 b.
and there are many examples ; and hence if a tenant has disavowed him who distrains for a service, the distraint for the service ought not on that account to cease, for the two things are consistent, the disavowal and the distraint. But if the distraint is made at the same time for the homage with the service, and thereupon a disavowal is made, some say that the distraint ceases, unless there be some one who would say, that if the donation and the concession cannot hold good for one part, that is, for the homage, it ought to avail for the service, and so the distraint ought not to cease, if it be that one may hold good and not the other, and unless it be that he cannot deny homage ; and if he says, I am unjustly disavowed,

deadvocat⁹ sum, et hac ratione, quia finis inde fact⁹ est, vel homagium in curia regis recognitū et cōvictum, et hujusmodi, et quo casu oportet, q sibi cautè pspiciat, vel p breve de fine facto, vel p breve de warrantia, & q sequatur finis & chirographum, vel ut paulò antedictum est, ut tenens summoneatur ad ostēdendū, cui faciat servitiū suum, & similiter ille dñs, qui attornavit, ad cognoscendū quid juris clamat in p̃dicto servitio, & tunc fiat, ut supradictū est, de p̃dicto Galfrido. Cùm autē servitiū sic attornādum fuerit, non magis attornari debet ad dānum et piculū ipsi⁹ tenētis, nisi voluerit, quàm ipsum homagiū, ut p̃dict' est, nō debet aliť facere, quàm priùs fecit, nisi velit, et secundùm quod prius fecit, nec plus servitii, nec plures sectas, nec alibi quā solebat; quia si ille, cui attornat⁹ est, hoc facere posset, ita tenens immodicè gravaretur. Prospiciat igitur tenens, cùm fuerit attornād⁹, q de eo, cui fuerit attornat⁹,[1] chartā habeat sufficientē, p quā se defēdere posset versus eū, cui fuerit attornat⁹, q plura servitia nō exigat quàm tenēs su⁹ ei facere teneatur, et p quē obligat⁹ sit ille dñs ad warrātiā & excābiū, sicut fuit ille qui attornavit.

Britton, l. ii. ch. iv. § 33. Fleta, 209.

14. Si dominus captionem homagii tenentis sui differat vel recuset per malitiam.

Itē esto quòd cùm dñs obligat⁹ sit ad capiendū homagiū tenētis sui, captionē illā differat vel recuset, in fraudē fortè, ne ei teneatur ad warrātiā, quo casu multipliciť poterit tenenti p̃videri; relaxatur inprimis à servitio, ad q nullo modo tenetur nisi capto homagio, & si p placitū et judiciū capi debeat, dñs oĩa arreragia amittet. Poterit etiā tenens, si voluerit,

[1] "cui attornatus erit," MS. Rawl.

and for this reason, because a fine was made thereon, or homage was recognised and proved in the king's court, and so on, and in which case it is needful that he provide cautiously for himself, either by a writ as to a fine made, or by a writ as to a warranty, and that a fine and chirograph should follow, or as said shortly above, that the tenant should be summoned to show, to whom he should make his service, and in like manner the lord, who has attourned him, to declare what right he claims in the aforesaid service, and then it should be done, as in the case above stated concerning the aforesaid Galfrid. But when a service is so to be attourned, it ought not to be attourned to the damage and the danger of the tenant himself, unless he is willing, any more than he ought to do the homage itself, as abovesaid, differently from what he has previously done, unless he is willing, and according to what he has previously done, nor more service, nor more suits, nor elsewhere than he was accustomed, for if he, to whom he has been attourned, may do this, the tenant in this manner would be immoderately aggrieved. Let the tenant therefore provide, when he is to be attourned, that he has a sufficient charter from him to whom he shall be attourned, by which he can defend himself against him to whom he has been attourned, that he may not exact from him more services than his tenant is bound to perform, and by which that lord may be bound to warranty and exchange, as he was who attourned him.

14. If the lord from malice delays or refuses to receive the homage of his tenant.

Likewise let it be, that when the lord is bound to receive the homage of his tenant, he delays or refuses to receive it, fraudulently perhaps, that he may not be bound to a warranty, in which case the tenant may be provided for in many ways; he is in the first place released from his service, to which he is in no respect bound, unless his homage has been received, and if it has to be received in virtue of a plea and a judgment, the lord will lose all the arrears. The tenant also may, if

oblato homagio corā plurib⁹ in coñ vel curia et p̃cisè recusato, attornare se superiori dño capitali, et si ipse homagiū recusaverit, alteri superiori, et ita de dño in dñm, quousq; p̥venerit ad ipsum regem, qui est principalis dñs descendēdo, et ultim⁹ ascēdendo, et hæres ultimus omnium hæredū. Et quid si superior dñs capitalis homagiū talis recusaverit, cùm fuerit ei oblatū, postquā inferior dñs homagium injustè recusaverit? nec ei fiet servitium non magis quàm dño inferiori, qui medi⁹ esse deberet, & sic dici posset de omnib⁹ aliis dñis superiorib⁹ capitalib⁹. Cùm autē tenēs sic se attornaverit superiori, et ipse homagiū suū ceperit, ille qui homagium suum recusavit, ulteriùs servitiū nec homagiū petere poterit, et nihilominùs tenebitur ad warrantiā, hoc p̥bato, quòd homagiū injustè recusaverit, & illū sequetur servitiū, cui factum est homagiū. Si autē sine causa tali, vel alia sufficiēti, tenens p̥ districtionē cōtra voluntatē suā homagium fecit superiori, vel extraneæ personæ, si verus dñs petat homagium, non poterit tenens recedere ab eo, cui homagium facit, sine iudicio, et quo casu, cùm ipse verus dñs petat à tenente suo, quòd faciat ei cōsuetudines & recta servitia, quæ ei facere debet, de libero teñto, q̥ de eo tenet in tali villa, ut in homagiis, releviis, redditib⁹ &c. & unde petit q̥ faciat ei homagiū, & relevium de tali feodo &c. & cùm talis venerit & cognoscit, quòd de eo tenere deberet feodū illud, & libenter faceret ei homagiū & servitium, si recedere posset à tali dño, qui homagium suum cepit p̥ districtionem, vel ipsum verum dñm penit⁹ deadvocavit, dicendo quòd nihil de eo teneat. Si autē ipsum advocaverit, ut p̃dictum est,

Britton, l. iii. ch. iv. § 2.

Fleta, 210.

f. 83.

he chooses, upon offering homage in the presence of several persons in the county or in the court, and upon its being precisely refused, attourn himself to his superior chief lord, and if he should refuse the homage, to another superior, and so from lord to lord until he comes to the king himself, who is the principal lord in the descending line, and the final lord in the ascending line, and the final heir of all heirs. And what if the superior chief lord has refused the homage of such an one, when it has been offered to him, after the inferior lord has unjustly refused homage, no service will be performed to him any more than to the inferior lord, who ought to be intermediate, and the same may be said of all the other superior chief lords. But when the tenant has thus attourned himself to a superior [lord], and the [superior lord] has received his homage, he who has refused his homage can no further claim his homage or his service, and nevertheless he will be bound to his warranty, upon proof of this, that he has unjustly refused homage, and the service will attend him to whom homage has been done. But if, without such a cause or any other sufficient cause, a tenant through distraint against his will has done homage to a superior or to an extraneous person, if the true lord claims homage, the tenant cannot withdraw from him, to whom he has done homage, without a judgment, and in which case, when the true lord himself claims from his tenant, that he perform to him the customs and right services, which he ought to do, for the free tenement, which he holds of him in such a vill, as in homages, reliefs, rents, &c., and thereupon claims that he do homage to him and relief for such a fief, &c., and when the said person comes and acknowledges that he ought to hold that fief from him, and that he would with pleasure do homage and service to him, if he could withdraw from the said lord, who took his homage by distraint, or entirely disavows the true lord himself, by saying that he holds nothing of him. But if he shall f. 83.

tunc sumoneatur ipse capitalis dñs superior, vel extrane⁹ non dñs, quòd sit ad certū diē, ad cognoscēdū q̄ juris clamat in homagio & servitio p̄dicti talis, vel ratione hæreditatis, quæ fuit talis antecessoris ipsi⁹ tenentis in tali villa, & unde talis ver⁹ dñs, s. in curia nr̄a &c. clamat homagium & servitium p̄dicti tenentis de eodē feodo, quo casu, cùm talis venerit, poterit ver⁹ dominus dicere, quòd homagium & servitium ad ipsum pertineat multis modis. Dicere enim poterit q̄ ad ipsum p̄tineat hac ratione, s. quia talis pater vel mater, avunculus vel matertera vel alius antecessor talis tenentis, talis fuit homo, talis patris, vel matris, avunculi, vel materteræ, vel alterius antecessoris ipsius domini, qui petit, & post talem antecessorē, qui sic fuit in seysina, fuit ali⁹ talis antecessor in seysina de homagio & servitio p̄dicti talis vel hæredis sui talis, & sic de plurib⁹. Ad quæ respondere poterit ille, qui sum̄onit⁹ est, & excipere multis modis, quare homagiū & servitiū nō p̄tineāt ad petentē, ut si mutationes et donationes intervenerint; ut si tales antecessores, vel hæredes eorum de quib⁹ fit mentio, postquā sic essent in seysina ut prædict' est, donationē fecissent, vel p̄mutationē, vel recognitionē, vel remissionē, p̄ cōcordiā vel p̄ judicium, post magnā assisam vel duellum, vel q̄ ali⁹ talis se gerit p̄ hærede talis dñi capitalis, & q̄ ille, qui petit, nō sit hæres, et ita q̄ ipse jampridem ipsum implacitavit p̄ aliud breve de servitiis et cōsuetudinib⁹, et petere poterit judiciū, si de una et eadē re, debeat simul et semel duob⁹ respōdere. Et sic cùm ipse petens p̄ judiciū sic recuperaverit, poterit ipse tenēs p̄ judiciū recedere de tali homagio. De tali materia habetis de t̄mino s. Hil̄ anno regis H. sexto in com̄

avow him, as aforesaid, then let the true lord himself be summoned or the stranger, the pretended lord, that he attend on a certain day, to declare what right he claims in the homage and service of so and so aforesaid, or in respect of the inheritance which there was of such an ancestor of the tenant himself in such a vill, and whereof such the true lord, to wit, in our court, &c. claims the homage and service of the tenant aforesaid from the same fief, in which case when the said person comes, the true lord may say that homage and service belongs to him in many modes. For he may say that it belongs to him for this reason, to wit, that such a father or mother, uncle or aunt, or other ancestor of such a tenant, was the man of such a father or mother, uncle or aunt, or other ancestor of the lord himself, who claims, and after such an ancestor, who was thus in seysine, there was another such ancestor in seysine of the homage and service of so and so aforesaid, or of so and so, his heir, and in like manner of several persons. To which, he who is summoned, may answer and except in many modes, wherefore homage and service do not belong to the claimant, as if changes and donations have intervened: as if certain ancestors or their heirs, of whom mention is made, after they were in seysine as aforesaid, made donations or exchanges or recognitions or remissions, by agreement or by judgment, after a great assise or a duel, or that a certain other person holds himself out to be the heir of the said chief lord, and that he who claims is not the heir, and so much so, that he himself has long before impleaded him by another writ for services and customs and may claim judgment, if he ought on one and the same thing to reply to two persons at one and the same time. And so when the claimant has thus recovered by a judgment, the tenant may by a judgment withdraw from such homage. In such a matter you have a case in St. Hilary Term, in the sixth year of

Dorset, de Alano de Sancto Georgio, rem petend, sed q nō dñs sūmoneri debeat, ut p̄dictū est, in principio habetis de t̄mino s. M. an. regis H. nono incipiēte decimo in com̄ Kanc. de Isabella de Hotot. Cùm autē tenēs verū dn̄m suū deadvocaverit in judicio, ut p̄dictū est, et nō dño suo fecerit homagiū & servitiū, cū omnino dn̄m suū deadvocaverit, vertetur placitū int̄ ipsū verū dn̄m & tenentē suū. Et unde inprimis vidēdū, utrū dñs agat p breve de servitiis & cōsuetudinib⁹, vel p breve q talis faciat ei homagiū & servitiū. Si autem p breve de servitiis & cōsuetudinib⁹, tunc refert, utrū dñs agat sup ipso jure, vel sup seysina homagii & servitii, s. utrum cōtineatur in brevi, q faciat ei consuetudines & recta servitia, quæ ei facere debet et solet, vel tantùm quæ ei facere solet, vel tantùm quæ ei facere debet, si autē super ipso jure, qualecunq; sit breve, et sive domin⁹ petat quòd tenens faciat, vel tenens petat q dominus capiat, p breve de homagio capiendo, in utroq; casu, p interrogationes & responsiones perveniri poterit ad duellum, vel magnam assisam, nisi ita sit, quòd ꝑpter deadvocationem velit dñs terrā petere in dominico p breve de recto, ut supradictum est. Cùm igitur summonit⁹ sit quis p breve, quare non capiat homagiū alicujus, & prætendat querens rationē, quare ille qui summonit⁹ est debeat capere homagiū suum, et dicat, quòd pater suus tenuit de tali & homagiū ei fecit, vel de tali alio antecessore & p tale servitium, et ita quòd ille tali ratione tenere debeat de eo, & ipse homagiū suum capere p servitium

f. 83 b.

Britton, l. iii. ch. iv. § 15.

Fleta, 210.

king Henry, in the county of Dorset, concerning Alan of St. George, the claimant, but that a pretended lord ought to be summoned, as aforesaid, you have in the beginning of Michaelmas term, in the ninth and tenth of king Henry, in the county of Kent, concerning Isabella de Hotot. But when the tenant has disavowed his true lord in a judgment as aforesaid, and has done homage and service to a pretended lord, when he has altogether disavowed his lord, the plea will turn between the true lord himself and his tenant. And hence in the first place it is to be considered, whether the lord should proceed by a writ for services and customs, or by a writ that such an one should do him homage and service. But if by a writ for services and customs, then it is of importance, whether the lord proceeds upon the right itself, or upon the seysine of homage and of service, to wit, whether it should be contained in the writ that he should perform for him customs and right services, which he ought and is accustomed to perform, or only what he is accustomed to perform, or only what he ought to perform; but if [he proceeds] upon the right itself, whatever may be the writ, and whether the lord claims that the tenant should perform, or the tenant claims that the lord should receive by a writ of receiving homage, in either case by means of interrogations and answers a duel or a great assise may be arrived at, unless it be f. 83 b. so, that on account of the disavowal the lord desires to claim the land in domain by a writ of right, as above-said. When therefore a person is summoned by a writ, wherefore he does not receive the homage of a certain person, and the complainant sets forth a reason, why he who is summoned ought to receive his homage, and says that his father held of such an one and did homage to him, or [held] of another of his ancestors and by such a service, and in such way that he ought to hold of him in the said manner, and the other ought to receive his homage by such service: he, against whom the claim is

tale; poterit ipse de quo queritur defendere servitium & homagiū suum factum, et dicere precisè quòd ille querens nullam terrā de eo tenet, nec tenere debeat, & se defendere ꝑ campionē vel ponere se in magnā assisam ꝑ hæc verba, s. utrum ipse de quo queritur, maj^{o} jus habeat tenendi terrā illā in doñico, an idem, qui queritur, tenendi eam de eo. Poterit enim benè esse, quòd talis querens vel antecessor suus homagium fecerit antecessori ejus de quo queritur, sed nunquam habuit seysinā in vita antecessoris ejus, vel quòd ipse tale homagiū ceperit, et quòd talis ꝑpria authoritate sine warranto et cōtra voluntatē donatoris se posuerit in seysinā, & unde petere poterit, ut prædictū est, terrā in dñico. Et de hac materia habetis in itinere abbatis de Rading et M. de Pateshul in coñ Warwick, anno regis H. quinto, de Roberto de Halgeford, qui petiit corā eis quòd quidā caperet homagiū et rationabile relevium suum de libero tenemẽto q de eo tenuit, et de eo tenere clamavit in tali villa, et unde dixit, quòd pater su^{o} tenuit de eo tantā terrā suā ꝑ tale servitium, & ipse ita eam tenere debuit de eo, et hoc obtulit & petiit, quòd caperet homagiū suum. Et talis venit & defendit q non debuit inde homagiū suum capere, quia terrā illā debuit tenere in dñico, et sic posuit se in magnā assisā ꝑ verba supradicta.

Britton, l. iii. ch. iv. § 13. Fleta, 210.

15. Si tenens propria authoritate divertat se ad alium, relicto domino suo, et faciat ei homagium.

Cùm autē quis à dño suo vel nō dño, cui homagiū fecerit & servitium, ꝑpria authoritate diverterit ad aliū et sine judicio, nihilominùs tamen tenebit homagiū. Et poterit tenens tenere de dño suo, qui attornaverit servitium suum alteri cum districtione, et ita poterit tenens deadvocare eum, cui servitium attornatū est. Sed in hoc casu nō cessabit districtio ꝑt deadvoca-

made, may defend the service and his taking of homage, and may say precisely that the claimant holds no land from him, nor ought to hold any, and may defend himself by a champion or put himself on the great assise by these words, to wit, whether he, against whom the claim is made, has the greater right of holding that land in domain, or he, who claims it, of holding it from him. For it may well be, that such a claimant or his ancestor did homage to the ancestor of him, against whom the claim is made, but never had seysine in the life of his ancestor, or that he took such homage, and that such an one of his own authority without a warrant and against the will of the donor put himself into seysine, and hence may claim, as aforesaid, the land in domain. And concerning this matter you have a case in the Iter of the abbot of Rading, and of Martin de Pateshull, in the county of Warwick, in the fifth year of king Henry, concerning Robert de Halgeford, who petitioned before them that a certain person should receive homage and his reasonable relief for a free tenement, which he held of him and professed to hold of him in such a vill, and whereof he said that his father held of him so much land by such a service, and he himself ought so to hold that land from him, and this he urged and claimed that he should receive his homage. And the said person came and said, in his defence, that he ought not to receive his homage therefrom, because he ought to hold that land in domain, and so he put himself upon the great assise by the words abovesaid.

15. If a tenant by his own authority turns aside to another, having left his own lord, and does homage to him.

But when a person turns aside of his own authority and without a judgment from his own lord or his pretended lord, to whom he has done homage and service, the homage will nevertheless be binding. And a tenant may hold of his own lord, who has attourned his service to another with the power of distraint, and so a tenant will be able to disavow him, to whom his service has been attourned. But in this case the power of distraint

tionem. Sed si utrūq; attornaverit de voluntate tenē-tis, aliud erit. Vel si utrūq; deadvocaverit, dñm qui attornaverit & attornatū, sed cùm cessaverit districtio p deadvocationē, et dñs pbare possit seysinā suā, & cùm p deadvocationē tenentis incipiat esse nō tenens, locū habere debet assisa novæ disseysinæ, et ad hoc bona est ratio. Sed cùm omnino deadvocat⁹ fuerit dñs, nullū habebit breve de servitiis & cōsuetudinibus, quia nihil clamat tenere de eo, igitur alio modo pcedēdū erit. Sed si cùm servitiū petat, vel p servitio distringat, & tenēs su⁹ ipsū omnino deadvocaverit, statim cessabit districtio, et oportebit q dñs sibi pvideat alio modo, sive jus habuerit in servitio sive nō, ad seysinā suā repetēdā, et hoc p breve de servitiis & cōsuetudinib⁹ quæ ei facere solet, ita q breve loquatur tātū de seysina & nō de jure, et tunc non erit ibi duellū, nec magna assisa, cùm breve loquatur tātū de seysina. Sed cū dñs petat servitiū, unde recēter fuit in seysina, aut tenēs cōfitebitur, vel nihil respōdit ad pposita, vel omnino negabit & defendit. Si autē confiteatur, planū est; si autē nihil respondeat, indefensus
f. 84. erit; si autem negaverit, oportet q petens pbet intentionē & seysinā suā. Sed refert qualiter, quia si offert pbare p corp⁹ cujusdā liberi hominis, non jacebit duellū, quia non agitur de ipso jure, nec si tenens vellet se defendere p duellū, vel ponere se in magnā assisā, non jacebunt pari ratione, quia non agitur de jure. Oportet igitur de necessitate, q petēs pbet p patriā, & tenens p patriā se defendat; cùm veritas sit sub dubio,

will not cease on account of the disavowal. But if he has attourned both [homage and service] with the consent of the tenant, it will be different. Or if he has disavowed both, namely, the lord who has attourned him and the person to whom he is attourned. But when the distraint has ceased by the disavowal, and the lord can prove his seysine, and when by the disavowal of the tenant there begins to be a pretended tenant, an assise of novel disseysine ought to find a place, and for this there is good reason. But when the lord has been altogether disavowed, he will have no writ of services and customs, because he professes to hold nothing from him, therefore the proceeding must be in another form. But, if when he claims a service, or distrains for a service, and his tenant has altogether disavowed him, the distraint will immediately cease, and it will be necessary for the lord to provide for himself in another manner, whether he has a right to the service or not, in order to recover his seysine, and this by a writ of services and customs, which he ought to perform for him, so that the writ should only speak of the seysine and not of the right, and then there will not be in such a case a duel or a great assise, since the writ speaks only of seysine. But when the lord claims the service, of which he was recently in seysine, either the tenant will admit or answers nothing to the propositions, or he will altogether deny and stands on his defence. But if he admits it is plain; but if he answers nothing, it is necessary that f. 84.
the plaintiff should prove his intention and his seysine. But it is of importance in what manner [this is done], because if he offers to prove it by the body of a free man, the duel will not lie, because the right itself is not in issue, nor if the tenant is willing to defend himself in a duel, or to put himself upon the great assise, they will not lie by parity of reason, because the right is not at issue. It is necessary, therefore, that the plaintiff prove [his case] by the country, and the tenant defend himself

ꝑpt̃ negationē tenentis. Et si tenens ꝑbare noluerit ꝑ patriā, cùm nullam aliā habuerit ꝑbationē, denegabitur ei actio. Sed cùm se posuerit super patriam, et in ꝑbatione defecerit, amittet, sive jus habuerit sive non, & licèt jus habuerit, deficere tamen poterit ꝑbatio. Si autem tenens ponere se noluerit super patriā, cùm nullā aliā habuerit defensionem, indefensus erit, & petens recuperabit, sicut videri poterit in assisa exemplū, ubi querens vel petens ad intentionē suam ꝑbandā se posuerit in assisam, & tenens assisā recusaverit.

16. Si dominus medius, cum servitium receperit a tenente suo, non acquietaverit eum versus superiorem dominum.

Cùm quis tenentis sui homagiū ceperit, vel fidelitatis sacrām̃tū, et servitiū tenentis sui, et cùm sit medi⁹ inī tenentem & dm̃, tenentē suū versus superiorem dm̃ non acquietaverit, sed ꝑpriæ bursæ totum infuderit, hoc ꝑbato vel testificato corā ꝑbis & legalibus hominib⁹, poterit absq; juris injuria seipsum ꝑpria manu acquietare, & facere servitium capitali dn̄o, & ille, qui medi⁹ est, ꝑ obligationē homagii nihilominus tenebitur ad warrantiā. Dictū est in præcedentib⁹, qualiter faciēdum est homagiū. Et de illis, qui tenentur ad sacrām̃tum fidelitatis, sicut illi, qui tenent in sokagio libero vel, ad vitam quocunq; modo, qualiter fidelitatem facere debeant, vel quibus, satis pendi poterit ex præmissis.

Cap. XXXVI.

1. De releviis dandis. Britton, l. iii. ch. v. § 1. Fleta, 211.

Cùm homagia facta fuerint & fidelitatis sacramenta ab illis,[1] qui plenæ ætatis extiterint, oportet statim quòd tenementum, quod fuit in manibus antecessorum, et hæreditas, quæ jacens fuit ꝑ eorum decessum, relevetur in man⁹ hæredum, & ꝑpter talē relevationem,

[1] "et fidelitates ab illis," MS. Rawl.

by the country, since the truth is in doubt through the denial of the tenant. And if the tenant is unwilling to prove by the country, since he has no other means of proof, an action will be denied to him. But when he has put himself on the country, and has failed in his proof, he loses, whether he has had the right or not, and although he may have the right, his proof may be deficient. But if the tenant be unwilling to put himself on the country, since he has no other defence, he will be without defence, and the plaintiff shall recover, as an example may be seen in the assise, where the complainant or the plaintiff puts himself on the assise to prove his intention, and the tenant has refused the assise.

16. If the intermediate lord, when he has received service from his tenant, has not acquitted him towards the superior lord.

When a person has taken homage of his tenant, or an oath of fealty, and when he is intermediate between the tenant and a lord, and has not acquitted his tenant towards the superior lord, but has put the whole into his own purse, upon this being proved or testified before respectable and loyal men, he may without any wrongful violation of right acquit himself by his own hand, and perform the service to the superior lord, and he, who is intermediate, shall be bound by the obligation of homage to warrant him. It has been said in the preceding [pages] how homage is to be done. And concerning those who are bound to an oath of fealty, as those who hold in free sockage, or for life in any manner, how they ought to do fealty and to whom will be sufficiently clear from what precedes.

Chapter XXXVI.

1. Of giving reliefs.

When homages have been done and oaths of fealty taken by those who are of full age, it is necessary immediately that the tenement, which was in the hands of ancestors, and the inheritance which was lying vacant by their decease, should be taken up into the hands of

facienda erit ab hæredib⁹ quædā præstatio, quæ dicitur releviū, de feodis militaribus, & serjeātiis, & aliis de quib⁹ fit homagiū et regale servitiū, vel de sokagiis, de quib⁹ de jure nullum fieri debet homagiū. Fit quædā p̃statio, quæ non dicitur relevium, sed quasi, sicut heriettum, quasi loco relevii, & quod dari debet aliquando ante sacrām̃tum fidelitatis, aliquando post. Et unde videndum inprimis, quale sit rationabile relevium, et quis debeat dare relevium, et quib⁹ sit dādum, & quotiens, & quando.

2. Quid sit rationabile relevium. Britton, l. iii. ch. v. § 1.

Et in primis de feodo militari. Quale sit rationabile releviū antiquū de feodo militari, distinguitur in charta libertatum,[1] c. 2. s. de comitatu integro[2] dandæ sunt c. libræ de hærede comitis p̱ relevio. Et de hērede baronis p̱ baronia integra[3] c. marc. De hærede militis, de feodo militis integro c. s. ad plus, & qui min⁹ debuerit, min⁹ det, secundùm q̱ tenuerit teñtum militare, plus vel min⁹, et secundùm antiquam cōsuetudinē feodorum. Et tale erit rationabile releviū de feodis militarib⁹.

f. 84 b.

3. Quis teneatur ad relevium.

Item quis dare debeat relevium? & sciendum quòd ille, qui alicui succedit jure hæreditario, & in cujus persona relevatur hæreditas, quæ jacens fuit per mortem antecessoris, & non alius. Non enim dabit relevium, qui seysinam ingreditur ex aliqua causa acqui-

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[1] "charta libertatum." The words of the Great Charter of king John are, "Si quis comitum vel baronum "nostrorum, sive aliorum tenen- "tium de nobis in capite per ser- "vitium militare, mortuus fuerit, "et cum decesserit, hæres suus "plene ætatis fuerit et relevium "debeat, habeat hæreditatem suam "per antiquum relevium; scilicet "hæres vel hæredes comitis, de "baronia comitis integra per cen- "tum libras; hæres vel hæredes "baronis, de baronia integra per "centum marcas; hæres vel hære- "des militis de feodo militis integro "per centum solidos ad plus: et "qui minus debuerit minus det "secundum antiquam consuetudi- "nem feodorum."

[2] "S. de baronia comitis integra," MS. Rawl.

[3] "de baronia baronis integra," id.

the heirs, and on account of such taking up a certain payment, which is called a relief, should be made by the heirs in the case of military fiefs and serjeanties, and other things for which homage is done and regal service, or in the case of sockages, for which of right no homage ought to be done. There is [also] made a certain payment, which is not called a relief, but as it were one, as a heriot, as it were in the place of a relief, and which ought to be given sometimes before the oath of fidelity, sometimes after it. And hence we must see in the first place what is a reasonable relief, and who ought to pay the relief, and to whom it should be paid, and how often, and when.

2. What is a reasonable relief.

And in the first place concerning a military fief. What is the quality of a reasonable ancient relief for a military fief is laid down in the Charter of Liberties, Chapter 2. For an entire county one hundred pounds is to be given by the heir of an earl for a relief. And from the heir of a baron for an entire barony one hundred marks. From the heir of a knight for an entire knight's fief one hundred shillings at most, and he who owes less should pay less according as he holds a military fief of greater or less extent, and according to the ancient custom of fiefs. And such will be a reasonable relief for military fiefs.

f. 84 b.

3. Who is bound to a relief.

Likewise who ought to pay a relief? And it is to be known, that he ought to do so, who succeeds to another by hereditary right, and in whose person the inheritance is relieved, which was lying vacant at the death of the ancestor, and no one else. For a person who enters through some cause of acquisition, as through a cause of

sitionis, sicut ex causa emptionis vel donationis, nisi ingrediatur ex causa successionis.

4. Quibus teneatur.

Item quibus sit dandum. Et sciendum, quòd non nisi dominis capitalibus & propinquioribus feoffatorib?, & si plures fuerint capitales domini gradatim ascendendo, quilibet hæres relevium dabit suo feoffatori & non aliis, vel ipsi domino regi, si fortè de eo tenuerit in capite per servitium militare.

5. Item quotiens. Britton, l. iii. ch. v. § 2. Fleta, 212.

Item quotiens, & sciendum, quòd non nisi semel tantùm, s. quamdiu hæres duraverit, qui semel relevavit. Nec etiam propter mutationem dominorum, si capitales domini plures decesserint de hærede in hæredem, & quamvis hac de causa plura capienda sunt homagia & ratione dominorum sint plura, tamen unicum erit quantum ad tenentem, quamvis sæpiùs innovatum, & ideò omnino unicum relevium. Item cùm tenens relevium semel dederit, & contingat mutationem fieri dominorum, ex causa donationis vel emptionis, per judicium vel concordiam, vel alio quocunq, modo, quamvis tenens aliquando diversis dominis, qui acquisierint, teneatur ad homagium, vel si dominus, de quo priùs tenuit, propter delictum vel propter defectum hæredis sublatus sit de medio, cùm tenens capitali domino superiori obligatus sit ad homagium, non propter hoc dabit relevium, cùm hæreditas in persona sua non decidat, quæ semel per ipsum fuit relevata, quamvis deciderit in persona domini sui capitalis per mortem, vel mutationem, defectum, vel delictum.

6. Item quando.

Item quando, de feodo militari. Et sciendùm, quòd post homagium factum, & cùm ei fuerit hæreditas sua per dominum capitalem restituta, vel cùm major factus sine impedimento & contradictione se posuerit in vacuam possessionem.

purchase or of gift, unless he enters through a cause of succession, will not pay a relief.

4. To whom he is bound.

Likewise to whom is it to be paid. And it is to be known, that it is not to be paid except to chief lords and the next feoffors, and if there be several chief lords gradually ascending, each heir shall pay a relief to his feoffor and not to the others, or to the lord the king himself, if by chance he hold of him in chief by military service.

5. Likewise how often.

Likewise how often. And it is to be known, that it is only once, to wit, as long as the heir lasts, who has once relieved. For it is not on account of the change of lords, if several lords have died heir after heir, and although for this cause several homages are to be taken, and they are several as regards the lords, they are however single as regards the tenant, although repeatedly renewed, and therefore altogether a single relief. Likewise when the tenant has paid once a relief, and it happens that there is a change of lords, by cause of a donation or a purchase, through a judgment or through an agreement, or in any other manner whatsoever, although the tenant may be bound to do homage to different lords who have acquired, or if the lord, from whom he formerly held, has been removed from the midst for failure or delict, when the tenant is bound to do homage to the chief lord, he will not on that account pay a relief, since the inheritance in his person does not fall down, which has been once relieved by him, although it may have fallen down in the person of his chief lord through death or change or failure or delict.

6. Likewise when he is bound to pay a relief.

Likewise when, in respect of a military fief? And it is to be known, that after homage has been done, and when his inheritance has been restored to him by his chief lord, or when having come to majority he has put himself into the vacant possession without impediment and contradiction.

7. De quibus rebus. Item quietantia custodiæ et relevii. Britton, l. iii. ch. v. § 3. Fleta, 212.

De serjantiis verò nihil certum exprimitur, quid vel quantum dare debeant hæredes, & ideò juxta voluntatem dominorum dominis satisfaciant pro relevio, dum tamen ipsi domini rationē & mensuram non excedant. Item fœmina, quæ semel in custodia fuerit, vel cùm plenæ ætatis extiterit semel relevium dederit, imperpetuum quieta erit de relevio, tam ipsa quàm vir suus, si posteà nupserit post custodiā vel relevii donationē, nec etiam si plures, nec etiā si uxor præmoriatur, vir iterum dabit relevium, quia tenet homagium priùs factum ad vitā suā & tenemẽtum tenebit semel relevatum, quòd in psona sua non decidit, nec ipse succedit ut hæres, sed, cùm vir moriatur, tunc decidit hæreditas & extinguitur homagium in persona sua, & quia durat obligatio homagii in psona hæredis, hæres homagium faciat & tenementum relevet, ad quod priùs non tenebatur in vita viri, quia tenuit homagium tota vita ipsius viri, nec debuit capitalis dominus duo homagia capere simul & semel & à duobus, ratione unius hæreditatis non partitæ. Et sic non tenetur quis de uno tenemento plura dare relevia, non magis quàm plura facere homagia. Nec debet aliquis plura recipere ab uno & eodem tenente, sed plura possit recipere à pluribus hæredibus tenentibus successivè. Et de hac materia habetis de termino S. Michaelis anno regni regis
f. 85. H. nono incipiente decim. coñ Stafford de Harneo Baggod & Rogero la Zusche, & Margar. Baggod, q̃ feoď suum tenuit de p̃dict. Rogero, & unde idem Roger⁹ fuit medi⁹ inť eos, & Margeria districta, eò q̃ idem Roger, non dedit relevium ipsi Harneo, & unde Roger⁹

But concerning serjeanties nothing certain is expressed, as to what or how much the heirs ought to give, and therefore according to the will of the lords they must satisfy the lords for the relief, provided always the lords themselves do not exceed a reasonable measure. Likewise a woman, who has been once in wardship, or when she has come of age, has once paid a relief, shall be acquitted for ever of any relief, herself as well as her husband, if she should have married after her wardship or the payment of a relief, nor even if she marries several; nor, if the wife shall pre-decease him, shall the husband again pay a relief, because he holds the homage previously made for his life, and will hold the tenement after it has been once relieved, which does not fall in his person, nor does he succeed as heir; but when the husband dies, then the inheritance falls in and the homage is extinguished in his person; and because the obligation of homage endures in the person of the heir, the heir should do homage and relieve the tenement, to which he was not bound in the lifetime of the husband, because she held the homage for the whole life of her husband, nor ought the chief lord to receive two homages at one and the same time from two persons, by reason of an inheritance not divided into shares. And so a person is not obliged to give several reliefs for a tenement any more than to do several homages. Nor ought any one to receive several [reliefs] from one and the same tenant, but he may receive several from several heirs holding successively. And on this matter you have a case in St. Michael's term, in the ninth and tenth years of the reign of king Henry, in the county of Stafford, concerning Harney Baggod and Roger la Zusche, and Margaret Baggod who held her fief of the said Roger, and wherein the said Roger was intermediate between them, and Margaret [was] distrained, on the ground that the said Roger had not paid a relief to Harney himself, and wherein Roger answered that he

7. For what things? Likewise the acquittance of custody and relief.

f. 85.

respondit, q̃ nullꝰ dedit relevium, quia frater suus, cujus hæres ipse fuit, inde fecit homag' & relevium patri ipsius Harnei, & ipse Rogerꝰ post mortem fratris sui, fecit homagium & relevium eid', & posteà fecit homag' matri ipsiꝰ Har. de cujꝰ feodo ipse tenuit id q̃ tenuit, & post fecit homagiū ipsi Harneo, ratione cujꝰ homagii idem Harneꝰ petiit relevium, & unde Rogerus petiit judicium, si teneretur ad plura relevia de uno tenemento quā ad unum, cùm semel haberet illud relevatum. Considerat̃ fuit q̃ Margeria & Rogerus essent quieti, & Harneus in misericordia, & q̃ Margeriæ satisfaceret de dāpnis suis & expensis. Nullus autem, qui acquisiverit aliquo genere acquisitionis, vel dñium īmutaverit vel quacunq; ratione ad vitā tenuerit, relevium dabit. Item nec ille qui aliquā duxerit in uxorem, q̃ aliquandiu extiterit in custodia dñi sui. Item nec ille, qui quacunq; ratione fuerit in custodia plus vel minus, dum tamen dominus, nomine custodiæ, receperit ad valentiam unius oboli. Item nec ille, qui semel relevium dederit, quamdiu vixerit aliud dabit. Possunt tamen quidā esse sub custodia, & nihilominꝰ relevium dabunt, quamvis fuerit[1] infra ætatem, sed tunc demum dabunt, cùm p̃venerint ad ætatem & non ante. Sed hoc est speciale in ipso rege p̃pter suum privilegium, ut si quis per feoffamentum ipsius dñi regis tenere debeat de eo in capite & hæredibus suis in feodo puro, sine aliqua conditione vel sub conditione, dum tamen ipse rex teneatur ad warrantiā & excābium, ipse rex habebit custodiam omnium terraꝝ, q̃ talis tenuerit de aliis p̃ servitium militare, de cuiuscunque feodo fuerint, usq; ad ætatem hæredis, & cum talis ad ætatem p̃venerit, restituta ei hæreditate dabit relevium dñis suis & non priꝰ, quia teñtum prius dis-

[1] "fuerint," MS. Rawl.

paid no relief, because his brother, whose heir he was, had done homage and paid a relief therefrom to the father of the said Harney, and Roger himself after the death of his brother had done homage and paid a relief to the same, and afterwards had done homage to the mother of Harney himself, from whose fief he held that, which he had in hand, and afterwards did homage to Harney himself, by reason of which homage the said Harney has claimed a relief, and whereupon Roger seeks a judgment, whether he is bound to more reliefs than one for a single tenement, after he has once paid a relief for it. It was adjudged that Margery and Roger were acquitted, and Harney at the mercy of the court, and that he ought to make good to Margery her damages and expenses. But no one, who has acquired by any kind of acquisition, or who has changed his lordship, or may hold for life in any manner, shall pay a relief. Likewise neither he, who has married any one who has been for some length of time in the wardship of her lord. Likewise neither he, who has once paid a relief, shall pay another as long as he lives. Some persons, however, may be under wardship, and nevertheless shall pay a relief, although they may be below age, but they shall then at length pay it, when they have come of age, and not before. But this is special in the case of the king himself on account of his privilege, as if a person by a feoffment of the lord the king himself ought to hold of him in chief, and to his heirs in absolute fee, without any condition or subject to a condition (as the case may be), provided the king himself is bound to warrant and exchange, the king himself shall have the custody of all the lands, which such an one held of others by military service, of whatever fief they may be, down to the majority of the heir, and when the said heir shall have arrived at full age, upon the restitution to him of his inheritance, he shall pay a relief to his lords, and not before, because the tenement could not previously be

tringi non poterit eo q extiterit in manu dñi regis, nec tenem̄ta eor̄ qui tenuerint de antecessorib⁹ hæredis, licèt videatur q distringi possūt, quia hæres ita infra ætatem homag' capere poterit & facere, & q statī sequi debeat relevium post homag' capt̄. Item esto, q hæres sit astrarius, vel q aliquis antecessor̄ restituat hæredi in vita sua hæreditatē & se dimiserit, videtur q nullo tempore jacebit hæreditas, & ideò q nec relevari possit nec debeat, nec relevium dari. Sed re vera quotiēscunq; quis ingreditur ut heres & p descensū, relevatur hæreditas in psona ejus, & erit relevium dand statim post homag' captum, quod quidē non fieret, nisi ingrederetur ut hæres. Item quæritur an liberè tenentes alicujus hæredis ad relevium dand teneantur contribuere, non ut videtur, sive sint ppinquiores tenentes sive remotiores, cùm quilibet de morte antecessoris proprii teneatur ad relevium suo feoffatori. Item quæritur, si cùm quis fuerit infra ætatem & in custodia domini sui, & tenens suus moriatur, hærede relicto qui fuerit infra ætatem, in cujus custodia esse debeat? & est ver̄, quòd in custodia illius domini capitalis, sub cujus custodia est hæres & warrantus suus, cum omnibus terris, tenementis & redditibus, quæ sunt de feodc
f. 85 b. illius domini capitalis, sed non ea q̄ sunt de feodo alieno, quia tunc ptinebit maritag' hæredis & custodia terræ ad dñm capitalem, de cujus feodo fuerit. Si autem talis fuerit plenæ ætatis, videnḍ' cui facere debeat relevium, dño capitali, vel suo warranto, cùm statī capi possit homag', quāvis hæres & warrant⁹ suus infra ætatem extiterit, & cùm capt̄ sit homag', statī sequi debeat relevium, & per hoc, q statī sit dño capi-

distrained from the circumstance that it was in the hand of the lord the king, nor the tenements of those who held of the ancestors of the heir, although it may seem that they may be distrained, because the heir so under age might receive and do homage, and because a relief ought to follow immediately after homage has been received. Likewise let it be that an heir is a householder, or that some ancestor restores to the heir during his own life his inheritance, and dismisses himself, it seems that the inheritance will lie vacant, and therefore that it neither can nor ought to be taken up, nor a relief paid. But in truth as often as any one enters as heir and by descent, the inheritance is taken up in his person, and a relief will have to be paid immediately after homage has been received, which would not be done, unless he entered as heir. Likewise it is a question, whether the free tenants of any heir are bound to contribute to pay the relief, not as it seems, whether they are next tenants or more remote, since each is bound on the death of his own ancestor to pay a relief to his own feoffor. Likewise it is a question, if when a person is under age and in the custody of his lord, and his tenant dies, an heir being left who is under age, in whose custody ought he to be? And it is true, that he should be in the custody of that chief lord, in whose custody the heir is and who is his warrantor, with all the lands, tenements, and rents, which are [part] of the fief of that chief lord, but not those which are parts of another's fief, because f. 85 b. then the maritage of the heir and the custody of the land will belong to the chief lord, of whose fief it may be [part]. But if such an one be of full age, it is to be seen to whom he ought to pay a relief, whether to the chief lord or to his warrantor, since his homage may be forthwith received, although his warrantor and chief lord may be under age, and when the homage has been received the relief ought forthwith to follow, and for this reason, that it is to be paid immediately to the

Britton, l. iii. ch. v. § 3. Fleta, 212.

tali solvend'. Sed videtur secund' quosdā, q̄ q̄vis relevium sequatur homag', q̄ non sit ante ætatem warranti solvend'. Esto etiā, q̄ tenens tenentis alicujus, cum dño suo talem fecerit cōventionem, q̄ post mortem suā hæres suus, si infra ætatem fuerit, non sit sub custodia sua, sed sub custodia parent̄ suoꝝ p̄ximoꝝ consanguineoꝝ, vel si plenæ ætatis extiterit, quòd null̄ dabit relevium; & contingat postmod', q̄ talis dñs medi⁹ moriatur, hærede infra ætatem relicto, & qui, cùm fuerit sub custodia dñi sui, petat idem dñs suus custodiā hæredis secundi teñtis, cùm fuerit infra ætatem, vel relevium, cùm plenæ ætatis extiterit, objicitur à parentib⁹ cōventio, replicatur à dño, q̄ fact' teñtis sui, nō potuit ei auferre custodiā vel relevium, q̄ ei cōpetit ratione hæredis p̄ximi teñtis sui, in custodia sua existentis. Responsum est ei ex adverso, q̄ nihil juris clamare poterit in p̄dictis, nō magis q̄ ille qui est in custodia sua, si esset plenæ ætatis, quia si ille peteret, obstaret ei cōventio; q̄ quidem ver̄ est, q̄ dñs capitalis nihil clamare potest. Sed distinguend' est, utr̄ hæres aliquis illius, cui talis facta fuit cōventio, nunquā fuerit p̄ talem cōcessionem sub custodia parent̄, cùm esset infra ætatem, vel plenæ ætatis, quietantiā haberet de relevio? & quo casu p̄fertur cōventio p̄pter seysinā antecessoris, qui obiit seysit⁹ de quietantia, & quia dñs & feoffator su⁹, quādo obiit nō fuit in seysina: si autē tenēs nunquā quietātiā habuerit, sed dñs obierit seysit⁹, dñs capitalis cōtra parētes obtinebit nō alia ratione, nisi quia hæres teñtis sui infra ætatē ad chartas cōtra cōvēt̄ionē respōdere nō poterit.

8. Si de sokagiis dari

Dict' est de relevio qd' p̄statur de feodo militari, nunc autē vidend', si de sockagio dari debeat relevium,

chief lord. But it appears according to some, that although relief follows homage, that it is not to be paid before the full age of the warrantor. Let it also be, that the tenant of a tenant when he has made such an agreement with his lord, that after his death his heir, if he be under age, shall not be under his custody, but under the custody of his nearest relatives by blood, or if he has come to full age, that he shall pay no relief; and it happens afterwards that the said intermediate lord dies, his heir being left under age, and who when he is under the custody of his chief lord, the said chief lord claims the custody of the heir of the second tenant, when he is under age, or a relief when he comes to full age, the agreement is set up as an objection by the relatives, the lord replies, that the act of his tenant could not deprive him of the custody and the relief, to which he is entitled in respect of the heir of his next tenant, who is in his custody. It is answered on the other side, that he cannot assert any right in the aforesaid, no more than he who is in his custody, if he were of full age, because if he were the claimant, the convention would be an obstacle to him: which is indeed true, that the chief lord can claim nothing. But a distinction is to be made whether the heir of him, by whom such an agreement was made, never was through such concession in the custody of his relatives, when he was under age, or when of full age had an acquittance of a relief; and in which case the agreement is preferred on account of the seysine of the ancestor, who died seysed of the acquittance, and because the lord and his feoffor, when he died, was not in seysine: but if the tenant never had an acquittance, but the lord died seysed, the chief lord will prevail against the relatives for no other reason than that the heir of his tenant under age cannot answer to charters against the convention.

8. If reliefs should be

It has been said of a relief, that it is paid for a military tenure, now we must consider if a relief is to be

debet relevium, vel quid, et quod de sokagio datur redditus duplicatus pro relevio.

cū de sockagio nō cōpetat dm̃o capitali custodia nec homag'; & ubi nulla custodia, ibi nulł releviū, sed è cōtrario. Revera de sockagio nulla cōpetat dm̃o capitali custodia, sed parentib⁹ ut p̃dict' est, nec homag', licèt in quibusdā partibus de consuetudine & p̱ abusum observetur cōtrariū, sicut in episcopatu Wyn. & alibi. Et cùm ita fact' sit qvis p̱ abusum, oportet q̱ de custodia & relevio fiat secund' q̱ fit de feodo militari. Et q̱ de sockagio nō datur relevium, nec cōpetet domino custodia nec maritag', habetis de term̃ S. M. anno r. H. sep. incipiente octavo com̃ Eboř circa finem rotuli, & qvis hæreditas nō releveť in p̱sona hæredis sockmāni p̱ man' domini capitalis, sed parenť, fit tamen de necessario [1] dm̃o capitali q̃dā p̃statio ab hærede p̱pter dm̃iū & dm̃i recognitionē, & q̃ p̃dictis rationib⁹ dici non poterit releviū, & q̃ talis est, vz. cùm teneatur sockmān⁹ defendere tenenť suum erga dominum suum p̱ cerť reddiť in pecunia numerata, vel p̱ quid tale, quod tantundem valeat, q̃ consistunt in pondere, numero, vel mensura, in solido vel in liquido, sicut frumento, vino, oleo, secundùm quod redditus diversimodè accipiuntur, loco relevii in recognitionem dominii dabit tenens domino suo & hæres una vice reddiť suū uni⁹ anni duplicať, sed q̱ nō solvat reddiť & posteà duplicať, sed q̱ solvat reddiť & postcà tātūdē in simplum. Sed refert, utř facere hoc debeat hæres, cū fuerit infra ætatē, ante vel post fidelitatis sacrañť, ad similitudinē homagii, ubi nō dand' est releviū ante homag' capť.

f.86. Britton, l. iii. ch. v. § 4. Fleta, 212.

[1] "De necessario," omitted MS. Rawl.

paid for a sockage, since the chief lord is not entitled to custody nor to homage in respect of a sockage; and where there is no custody, there is no relief, but on the contrary. In truth in respect of a sockage the chief lord is not entitled to custody, but the relatives are, as above said, nor to homage, although in some parts from custom and by abuse the contrary practice is observed, as in the bishopric of Winchester and elsewhere. And when it is so practised although by abuse, it is necessary that in respect of custody and homage the same practice be observed, as is done in the case of a military fief. And that a relief is not paid for sockage, nor is the lord entitled to custody or to maritage, you have a judgment in St. Michael's term in the seventh and eighth of king Henry, about the end of the roll, and although the inheritance is not relieved in the person of the heir of a sockman by the hand of the chief lord, but of a relative, there is made however of necessity to the chief lord a certain payment by the heir on account of his lordship and the recognition of the lord, and which for the aforesaid reasons cannot be called a relief, and which is of this kind, to wit, when the sockman is bound to maintain his tenement towards his lord by a certain rent in money counted down, or some certain thing which is worth as much, which consist in weight, number, or measure, in solids or in liquids, as in corn, wine, oil, according as rents are received in different ways, in the stead of a relief in recognition of lordship, the tenant and heir shall pay to his lord for once double the rental of one year, not that he should pay a rental and afterwards a double rental, but that he should pay a single rental and then as much again. But it is of importance whether the heir ought to do this when he is under age, before or after the oath of fealty, after the likeness of homage, when a relief is not to be given before homage has been received.

paid for sockages, or what, and that from sockage tenures a double rent is paid for reliefs.

f. 86.

9. Si de feodi firma, vel quid.

Quid autē fieri debet de teñto, q̄ tenetur ad feodi firmā, nō est aliquid certī determinaī sicut in p̃missis, sed tamen videnḋ' est, q̄ ratio observetur & rationabilis sit p̃statio & releviū, sicut rationabile debet esse cujuslibet auxilium, habito respectu tā ad psonā dñi, q̄ teñtis, q̄ p̃statio sive donū fiat secundū q̄ deceat teñtē dare, & dñm recipere, secundḋ facultates teñtis qui dat, & necessitatē dñi qui accipit, & ita q̄ p̃statio non gravet teñtē, nec egentē dimittat accipientē, non enī debet esse id q̄ p̃statur maximū vel minimū. Itē nec majus q̄ expediat danti, nec min^{9} q̄ deceat accipientē. Item nec magñ, nec parvū, sed mediū. In oñi autē rationabili p̃statione observetur mediū, cū sit modus in reb^{9}, &c. Cùm autem in hujusmodi causa fiat excessus, non tenebit ulteriùs modus vel mensura, nec erit rationabilis p̃statio vel auxiliū.

10. Nota de herietto. Britton, l. iii. ch. v. § 5. Fleta, 212.

Est quidē[1] alia p̃statio q̃ nominatur heriettū, & q̃ nullā cōparationē habeat ad relevium, sc. ubi tenens, liber vel servus, in morte sua, respicit dñm suum de quo tenuerit, respicit de meliori averio suo, vel de secundo meliori secundùm diversā locoī consuetudinem, q̃ quidem p̃statio magis fit de gratia, q̄ de jure, & q̃ hæreditatem non contingit.

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[1] "Est quidem, &c." This paragraph forms part of the text of MS. Rawl. without any intimation, that it is to be regarded as a note.

FINIS CAPITIS XXXVI. LIBRI II.

9. If a relief ought to be paid of a fee-farm, or what?

But as to what ought to be done with respect to a tenement, which is held in fee farm, nothing certain has been determined as in the premises, but we must see that reason is observed, and that the payment and relief is reasonable, as the aid of each person ought to be reasonable, regard being had as well to the person of the lord as of the tenant, that the payment or present be according to what it is becoming for the tenant to give and for the lord to receive, according to the means of the tenant who gives, and the necessity of the lord who receives, and so that the gift does not aggrieve the tenant, nor send away the receiver in need, for that which is given should be neither very great nor very small. Likewise not greater than is expedient for the giver, nor less than is becoming for the receiver. Likewise neither great, nor small, but intermediate. But in every reasonable payment let the mean be observed, since there is moderation in all things, &c. But when in a cause of this kind excess takes place, neither mean nor measure will further hold, nor will the payment or aid be reasonable.

10. Note as a heriott.

There is another kind of payment, which is called a heriott, and which has no comparison to a relief, to wit, where the tenant, free or serf, on his death remembers his lord from whom he holds, remembers him with his best beast or his second best beast according to the custom of the country, which gift indeed is rather made of grace, than of right, and which does not affect the inheritance.

HERE ENDS CHAPTER XXXVI. OF BOOK II.

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